Supreme Court, U.S.
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No. 08-638

In The

Supreme Court of the United States

MESHWERKS, INC.,

Petitioner,

v.

TOYOTA MOTOR SALES, U.S.A., INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether digital models of real-world objects are protected by the Copyright Act of 1976.

2. Whether an original computer program is protected by copyright, even if the images generated by the program are not.

PARTIES

Plaintiff-Appellant and Petitioner: Meshwerks, Inc., a Utah corporation.

Defendants-Appellees and Respondents: Toyota Motor Sales U.S.A., Inc., a California corporation, Grace & Wild, Inc., a Michigan corporation doing business as "Division X", 3d Recon, L.L.C., a Utah limited liability company, and Saatchi & Saatchi North America, Inc., a California corporation.

CORPORATE DISCLOSURE STATEMENT

Meshwerks, Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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PETITION FOR WRIT OF CERTIORARI

Meshwerks, Inc. respectfully petitions for writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Tenth Circuit, which denied copyright protection for digital models of real-world objects.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Tenth Circuit, dated June 17, 2008, is officially reported at 528 F.3d 1258, and is reproduced at App. 1-29.

The Order and Memorandum Decision of the U.S. District Court for the District of Utah, Central Division, dated September 12, 2006, is unofficially reported at 2006 WL 2623935 and 2006 U.S. Dist. LEXIS 65641, and is reproduced at App. 32-45.

JURISDICTION

The judgment of the U.S. Court of Appeals for the Tenth Circuit sought to be reviewed was entered on June 17, 2008. A petition for rehearing was denied by the U.S. Court of Appeals in its Order dated August 14, 2008, reproduced at App. 46-47. The petition is timely under Supreme Court Rule 13.3, because it is being filed within ninety (90) days of entry of the order denying the petition for rehearing. This Court

has jurisdiction to review the judgment of the U.S. Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AT ISSUE

17 U.S.C. § 102(a)

Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:

(1) literary works;

(2) musical works, including any accompanying words;

(3) dramatic works, including any accompanying music;

(4) pantomimes and choreographic works;

(5) pictorial, graphic, and sculptural works;

(6) motion pictures and other audiovisual works;

(7) sound recordings; and

(8) architectural works.

17 U.S.C. § 101

Section 101 of the Copyright Act of 1976 contains a number of definitions which are relevant to the analysis and interpretation of Section 102(a). The relevant definitions are recited in the body of the brief.

STATEMENT OF FACTS

A. Meshwerks Created Digital Models of Toyota Vehicles

Meshwerks, Inc. ("Meshwerks") is in the business of creating interactive 360-degree digital "models" of real-world objects, which representations create the illusion of three-dimensional spaces on a two-dimensional computer or video screen. *See* Declaration of Kevin Scheidle, ¶¶ 3-4 at App. 56 (hereafter "Scheidle Decl.") (exhibits omitted).[1] In this case, Meshwerks created digital models of a number of Toyota vehicles (the "Digital Models"), which were designed to be used in advertisements for those products. *Id.* at ¶ 9. Given the new technology at issue, it is important to have a clear understanding of the digital modeling process and product in order

[1] In granting summary judgment below, the district court indicated that it "adopts Meshwerks' recitation and characterization of the digital modeling process." *See* Memorandum Decision, at App. 37, note 2. Consequently, the facts on appeal are those contained in the Scheidle Declaration.

to evaluate the copyright "originality" issue on appeal.

B. The Digital Models Were Registered for Copyright as Computer Programs

Prior to bringing this action, Meshwerks applied for and received copyright registration certificates for each of the Digital Models from the U.S. Copyright Office. The registrations were made as "computer programs" on Form TX, and a sample of the actual computer code was submitted as the deposition for the registration. *See* Meshwerks' Copyright Registration Application for Digital Model of Toyota Camry (1 of 8 such applications), at App. 62-63, with a portion of the computer code filed with the application for deposit (first of 10 pages submitted), at App. 64. *See also* Scheidle Decl. at ¶ 32 (App. 61).

C. The Separate Digitalization and Modeling Stages

There was a two-stage process in making the Digital Models. The first step involved "digitalization", whereby certain parts of the vehicles were digitally mapped and measured. *See* Scheidle Decl. at ¶ 12. However, digitalization does not create a "wire frame model" of the vehicle, as misstated by the Tenth Circuit. *See* Tenth Circuit Opinion, at App. 4. Rather, digitalization results only in "a jumbled mess of grid lines and measured parts" of the vehicle. *See* Scheidle Decl. at ¶ 14 (App. 58). Therefore,

digitalization is only the initial step toward creating a digital model. *Id.* at ¶ 15.

In contrast, the second and more involved stage was the digital modeling. *Id.* at ¶¶ 15-25. Using the digital measurement points and grid lines, along with photographs and other reference materials, the digital sculptor creates a rough outline of the vehicle represented. *Id.* at ¶ 16. Then, the digital sculptor makes numerous creative efforts and decisions in how to best represent the vehicle in a digital form. *Id.* at ¶ 20. To that end the digital sculptor creates his or her own lines to develop the most desirable perspectives, contours and details, using the least amount of digital data. *Id.* at ¶¶ 20-23. In addition, the digital sculptor creates other parts and details from scratch, without even using the digital measurements as a reference. *Id.*

D. The Digital Models Are Creative Representations of the Vehicles

Far from being a mechanical depiction, the Digital Model gives the illusion of a real world object on a two-dimensional digital screen, using the graphic sculptor's skills and creativity. *Id.* at ¶¶ 6-8. Moreover, the Digital Model is not a "copy" of the vehicle it depicts, but rather a creative representation of it, much like a realistic looking painting of that object. *See id.*, at ¶ 8.

After nearly 80 to 100 hours of such modeling efforts per vehicle, the digital sculptor ultimately

creates a three-dimensional interactive model, complete with all of the vehicle's exterior, interior and detail areas. *Id.* at ¶¶ 17-23. As a result, while digital measurements were used to create rough outlines of parts of the vehicles, 90% of the finished linework in the Digital Models does not even correspond to the original measurements. *Id.* at ¶¶ 26-28. That is also why digital models created by different digital sculptors will vary, even though they may be based on the same object. *Id.* at ¶ 27.

Screen prints of the Digital Models do not accurately reflect the models themselves, which are embedded in interactive computer software, and designed to be viewed in that fashion. *Id.* at ¶¶ 30-31. In fact, the Digital Models appear much differently when being run through the software on a computer screen or other digital projection, and can be moved in different ways, viewed from different angles, and manipulated by the viewer to explore interior and detail areas. *Id.* at ¶ 30.

E. Defendants Copied the Actual Computer Programs

Defendant/Appellee Grace & Wild, Inc. ("G&W") negotiated for and obtained a limited license from Meshwerks to use the Digital Models as part of a television commercial for defendant Toyota Motor Sales, U.S.A, Inc. In negotiating the price, G&W made it clear to Meshwerks that it was seeking a one-time use of the Digital Models – not an unlimited

license or outright purchase – for which Meshwerks would have charged considerably more money. Given the minimum fee charged, G&W also understood that Meshwerks would continue to offer the Digital Models to other advertising agencies through its commercial catalog of digital models. However, after receiving the Digital Models, G&W and the other defendants made unauthorized electronic copies and unauthorized commercial use of the computer files comprising the Digital Models, and distributed them to numerous other parties, thus destroying any secondary market for the works. As a result, Meshwerks brought action for copyright infringement against the parties who were copying and using its Digital Models without authorization.

F. The Courts Ruled That the Digital Models Were Not Protected Without Ever Reviewing the Models Themselves

However, the district court ruled on summary judgment that the Digital Models did not satisfy the "originality" requirement of the Copyright Act of 1976 because they resembled the Toyota vehicles they depicted. *See* Memorandum Decision, at App. 14. The Tenth Circuit affirmed that decision – even though the Digital Models were registered as computer programs, not as visual works. *See* Opinion, at App. 27. Moreover, neither court examined the Digital Models themselves, nor the computer code for which copyright registration was issued, but only a few screen prints from the underlying computer

programs. *Id.* at App. 5, 16, 22, & 26, and Appendix A to Opinion.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit's ruling denies copyright protection to a whole new field of computer-based expression, involving the creation of 360-degree interactive digital models of real-world objects. Moreover, the ruling conflicts with the Copyright Act of 1976, a contrary ruling of the Copyright Office, and the holdings of other courts. Further, the Supreme Court has not given any guidance on the "originality" issue for over fifteen (15) years, when it considered whether a telephone book was protected by copyright. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 111 S. Ct. 1282, 113 L. Ed. 2d 358 (1991). However, there has been a substantial increase in the use of computer technology since 1991, and digital imaging is now the accepted medium for most forms of commercial expression. In addition, copyright is the only real way to protect digital files from misappropriation, given that they can be copied and widely disseminated with a few computer keystrokes.

In this case, the Tenth Circuit ruled, *as a matter of law*, that Meshwerks' Digital Models were not protected by copyright because they resembled the Toyota vehicles which they depicted. If that ruling is correct, then digital models of real-world objects are never protected by copyright – because the generated

images of such computer programs will always resemble the objects depicted (at least with good models).

Moreover, the Tenth Circuit erred because it failed to address the actual expression at issue, which is computer-based. To that end, Meshwerks did not obtain a copyright registration on the *images* generated by its Digital Models, but rather the underlying *computer code*, which reflects its original contribution. By the same token, digital models from different modelers would have distinct computer code – even if modeling the same objects, and even though the generated images would be similar. As a result, Meshwerks and other digital modelers are entitled to copyright protection for their original works, and should be able to preclude others from making verbatim copies of the underlying computer programs, as occurred in this case.

I. THE DIGITAL MODELS ARE "ORIGINAL WORKS" PROTECTED BY THE COPYRIGHT ACT

Contrary to the Tenth Circuit's ruling, Meshwerks' Digital Models are "original works of authorship" protected by the Copyright Act of 1976 (the "Copyright Act"), and have more than the required "creative spark" to merit such protection.

A. Computer Renderings and Models Are Protected, as Long as There Is at Least a "Slight Amount" of Creativity Involved

The Copyright Act protects computer renderings of real-world objects, just as it would other types of original depictions. According to the Act:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed *in any tangible medium of expression, now known or later developed*, from which they can be perceived, reproduced or otherwise communicated, *either directly or with the aid of a machine or device.*

17 U.S.C. § 102(a) (emphasis added). Consequently, the Copyright Act protects all kinds of original works, including such things as computer programs, compilations, databases, photographs, paintings, sculptures, maps, models,[2] screenplays, films, audio-visual works,[3] sound recordings, music, architectural plans, etc. *See* 17 U.S.C. §§ 101 & 102(a). This is also true

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[2] "[M]odels" are works of "applied art" included within the definition of "pictorial, graphic and sculptural works" 17 U.S.C. § 101.

[3] "Audiovisual works" are defined as "works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, *if any*, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied." 17 U.S.C. § 101 (emphasis added).

when new forms of technology are employed, as in the present case. *See* 17 U.S.C. § 102(a) ("any tangible medium of expression, now known or later developed").

Moreover, this Court has already ruled that only a "slight amount" of creativity is required for a work to be "original" under the Copyright Act. *See Feist*, 499 U.S. at 345. According to the Court:

> Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works), *and that it possesses at least some minimal degree of creativity. To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice.* The vast majority of works make the grade quite easily, as they possess some creative spark, 'no matter how crude, humble or obvious' it might be.

Id. (citations omitted) (emphasis added). To that end, even a compilation of known facts can be protected by copyright so long as there is some level of originality in their organization. *See id.*

B. The Digital Models Are Sufficiently Creative

Given this minimal standard, Meshwerks' Digital Models more than qualify as "original works of authorship" under the Copyright Act. First, they were created independently by Meshwerks, and not copied

from any other digital models. *See* Scheidle Decl. at ¶¶ 12-26 (App. 57-60). Second, they are digital representations of utilitarian objects, which objects are not themselves subject to copyright protection. *See* 17 U.S.C. § 101; 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.08[B][3], at 2-97 (2007). Third, the record evidence shows that both skill and creative decision-making were required to make the Digital Models. *See* Scheidle Decl. at ¶¶ 5-8, 14-26. That creative input, or "human touch", is reflected by the fact that over 90% of the completed line work in the Digital Models does not correspond to the actual lines of the vehicles themselves. *Id.* at ¶¶ 26-28. That is also why digital models created by different digital sculptors will vary, even though they may be based on the same object. *Id.* at ¶ 27.

As a result, Meshwerks' Digital Models are not "slavish copies" of the Toyota vehicles, but rather creative and interactive depictions of those objects in a different medium and dimension. As a result, and similar to a realistic painting or sculpture, they are protected by copyright. *See Gracen v. Bradford Exchange*, 698 F.2d 300, 304 (7th Cir. 1983) (superrealist paintings and other accurate depictions are protected by copyright). As Judge Posner noted in *Gracen*, "[a] portrait is not unoriginal for being a good likeness." *Id.* at p. 304. *See also Kamar Int'l, Inc. v. Russ Berrie and Co.*, 657 F.2d 1059, 1061 (9th Cir. 1981) (stuffed animals protected even though they accurately reflect real ones).

C. Depictions of Commercial Products Are Also Protected

The Tenth Circuit ruled that the Digital Models should not be protected because they depict Toyota's own vehicles, and therefore are not "original" to Meshwerks. *See* Opinion, at App. 22. However, original depictions of commercial objects are protected by copyright. *See Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000) ("*Skyy Spirits*"); *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301 (S.D. N.Y. 2000).

In *Skyy Spirits*, defendant asserted that a photographer's "product shots" of its vodka bottle were not protected by copyright. *See* 225 F.3d at 1073. The trial court agreed, and granted summary judgment. However, the Ninth Circuit reversed, noting as follows:

> Skyy argues, in a nutshell, that the commercial photographs of its vodka bottle are not worthy of copyright protection. We disagree. The essence of copyrightability is originality of artistic, creative expression. Given the low threshold for originality under the Copyright Act, as well as the longstanding and consistent body of case law holding that photographs generally satisfy this minimal standard, we conclude that Ets-Hokins' product shots of the Skyy vodka bottle are original works of authorship entitled to copyright protection.

Id. Since the photographer's work was protected by copyright, Skyy Spirits did not have the right to copy or use those photographs without his authorization. *See id.*

The *SHL Imaging* court likewise ruled that plaintiff's photographs of defendant's picture frames were protected by copyright. *See* 117 F. Supp. 2d at 311. That court also stated that:

> it is not difficult to satisfy the originality requirement; an author need only independently create the work and imbue it with "some minimum level of creativity", a "creative spark.'"

Id. at 309 (quoting *Feist*, 499 U.S. at 345, 358, 111 S. Ct. at 1290, 1294).

These photography cases are illustrative because they reject similar attempts by commercial product holders to deny copyright protection for original representations of their utilitarian products. However, and as explained below, digital modeling is different than photography, and needs to be evaluated on its own terms for originality – which the Tenth Circuit failed to do.

D. Digital Modeling Is Different than Photography

As stated by the Ninth Circuit, "'almost any photograph may claim the necessary originality to support a copyright merely by virtue of the photographers' [sic] personal choice of subject matter, angle of photograph, lighting, and determination of the precise time when the photograph is to be taken.'" *Skyy Spirits*, 225 F.3d at 1068 (*quoting Nimmer on Copyright*, § 2.08[E][1], at 2-130 (1999)). Moreover, such decisions are reflected in the visual image created, i.e., the photograph itself. That being said, "the fact that two original photographs of the same object may appear similar does not eviscerate their originality or negate their copyrightability." *Id.* at 1077.

Digital modeling is different than photography. Digital modelers make creative decisions on how to depict their modeled subject in the digital medium, through the selection and addition of digital information to create the desired representation. *See* Scheidle Decl. at ¶¶ 6, 20-26 (App. 56, 59-60). As further explained below, these creative decisions are mostly reflected in the underlying computer programs, because the whole point of a good model is to make it appear like the depicted object. *See id.* at ¶¶ 8, 20, 26. Thus, while the generated images may be similar, the underlying computer programs will be different. *Id.*

Moreover, the digital modeler is not required to depict the vehicle "in front of a palm tree, whizzing down the open road, or climbing up a mountainside"

to receive copyright protection, as suggested by the Tenth Circuit. *See* Opinion, at App. 14. In contrast, such models are protected because of the original work in the underlying computer programs.

II. ORIGINAL COMPUTER PROGRAMS ARE COPYRIGHTABLE EVEN IF THE IMAGES GENERATED BY THE PROGRAMS MAY NOT BE

Consequently, the Tenth Circuit's ruling is erroneous – and arose from its failure to focus on what Meshwerks actually registered for copyright, i.e., the computer programs themselves – not the screen images generated by them. Moreover, Meshwerks' original computer programs are protected by copyright even if the images of Toyota vehicles generated by those programs are not.

A. The Tenth Circuit's Ruling Was Based On Screen Images, Not the Registered Computer Programs

In deciding that the Digital Models were not protected by copyright, the Tenth Circuit focused on a few *screen images* of the models.[4] However,

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[4] Statements to that effect include the following: (1) "Attached to this opinion as Appendix A are sample *screenprints* of one of Meshwerks' digital wire-frame models," *id.* at App. 5; (2) "We hold that the unadorned *images* of Toyota's vehicles cannot be copyrighted by Meshwerks," *id.* at App. 16; (3) "In the case before us, there is no doubt that transposing the physical

(Continued on following page)

Meshwerks registered the Digital Models with the U.S. Copyright Office as "computer programs" – not as visual works – and submitted only computer code with its registration applications. *See* App. 62-64. This is significant, because both the trial court and the Tenth Circuit ruled that the Digital Models were not protected by copyright without reviewing what was actually registered, i.e., Meshwerks' original computer programs – not the visual images of Toyota vehicles generated by those programs. Moreover, the copyright registrations issued for Meshwerks' Digital Models created a "presumption of originality" in those computer programs, *Skyy Spirits*, 225 F.3d at 1075, which legal presumption was never rebutted with any contrary evidence.

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appearances of Toyota's vehicles from three dimensions to two, such that *computer-screen images* accurately reflect Toyota's products, was labor intensive and required a great amount of skill," *id.* at App. 22; (4) "But because the end-results were unadorned *images* of Toyota's vehicles, the appearances of which do not owe their origins to Meshwerks, we are unable to reward that skill, effort, and labor with copyright protection," *id.*; and (5) "Far from being frivolous, this suit presents a novel and consequential question focused on the *copyrightability of images* in a relatively new technological medium," *id.* at App. 26 n.11 (emphasis added).

B. Computer Programs Are Protected by Copyright

For more than two decades, courts have held computer programs copyrightable as "literary works" under 17 U.S.C. § 102(a)(1). *E.g., Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983). Similarly, courts have long held that screen displays generated with computer programs are separately copyrightable, for example, as audio-visual works. *E.g., Stern Electronics, Inc. v. Kaufman*, 669 F.2d 852 (2d Cir. 1982).

Moreover, copyrightable screen displays can be infringed without copying the underlying computer code, *id.* at 855-57, and the underlying computer code can be infringed without copying the computer screen images, *Midway Mfg. Co. v. Strohon*, 564 F. Supp. 741 (N.D. Ill. 1983). Accordingly, "computer programs and the displays they generate are discrete objects of copyright protection," 1 Paul Goldstein, *Copyright* § 2.15.3 (1989); *see also* 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 2.18[H][3][b] (2007), even though they may be included in a single registration under the single description of "computer program." *See* U.S. Copyright Office, *Circular 61: Copyright Registration for Computer Programs*, p. 4 (2008).

C. Computer Programs Are Protected Independent of Their Screen Images

Significantly, copyright has been upheld in computer programs without *any* screen images. *See, e.g., Apple Computer*, 714 F.2d at 1244 n.4 & 1251 (holding as copyrightable, *inter alia*, an operating system program that "translate[s] a high level language program from source code into its binary language object code form"). Moreover, there is no statutory or rational basis for denying the copyrightability of one element of a work based on the uncopyrightability of another element. *Cf. Data East USA, Inc. v. Epyx, Inc.*, 862 F.2d 204, 209 (9th Cir. 1988) (suggesting that "identical copying" might infringe protectable elements of a video game, even though the alleged copyrightable content was held to be "scenes a faire").

In fact, the U.S. Copyright Office already addressed this issue with respect to computer programs that generate typeface images or fonts which are not themselves copyrightable. Specifically, it determined that "original computer programs are registrable, regardless of whether or not the functional result achieved is the generation of unregistrable typeface, typefonts, or letterforms." *Registrability of Computer Programs That Generate Typefaces*, 57 Fed. Reg. 6201 (Feb. 21, 1992) (supplementary information accompanying final regulation amending 37 C.F.R. § 202.1), reproduced at App. 50.

The Copyright Office decision is directly analogous, given the Tenth Circuit's ruling that the visual *images* generated with Meshwerks' computer programs are not copyrightable because they closely resemble the Toyota vehicles they depict. Even if that were correct, the Tenth Circuit's ruling would still be erroneous, because it failed to address what Meshwerks actually registered for copyright protection. As with the computer typeface issue, it is the Digital Model's underlying computer program which is original, and is therefore protected by copyright.

III. THE COMPUTER PROGRAMS WERE CREATED BY MESHWERKS

Again, the Tenth Circuit's ruling was based on its finding that the screen images of Meshwerks' models "owe their origins to Toyota, not to Meshwerks." Opinion, at App. 27. However, the record evidence shows that the underlying computer programs owe their origins to Meshwerks, not to Toyota. *See* Scheidle Decl, ¶¶ 26-28, 30-33, at App. 60-61. Because each digital model contains original code, Meshwerks' computer programs are copyrightable. As a result, others should not be allowed to misappropriate such original works by making verbatim copies, as was the situation in this case.

A. Meshwerks' Digital Models Are Computer Programs, and Were So Registered with the U.S. Copyright Office

As defined in the Copyright Act, "[a] 'computer program' is a set of *statements or instructions* to be used *directly or indirectly* in a computer in order to bring about a certain result." 17 U.S.C. § 101 (emphasis added). As a result, Meshwerks' digital models fall within the statutory definition of a "computer program." According to the U.S. Copyright Office, claimants should register their works according to the nature of the predominant authorship. *See* U.S. Copyright Office, *Circular 61: Copyright Registration for Computer Programs*, p. 4 (2008).

Thus, predominantly literary works should be registered using Form TX, pictorial or graphic works using Form VA, and audiovisual works using Form PA. *Id.* It is undisputed that Meshwerks registered the Digital Models using Form TX, represented to the Copyright Office that they were "computer programs", and submitted printouts of computer code as the registration deposit. *See* App. 62-64.[5]

As explained in the Scheidle Declaration, Meshwerks' Digital Models are Maya language project files, which comprise sequences of digital instructions for generating three-dimensional images when executed

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[5] Meshwerks actually attached twenty (20) pages of computer code to each of the copyright registration applications. *See* App. 62 ("first and last 10 pages" of computer program).

in the Maya software suite. *See* Scheidle Decl. at ¶¶ 7, 31-32 (App. 57, 60-61). Maya files can also be printed in human-readable files, called Maya ASCII, which Meshwerks deposited with its copyright registration applications. *Id.* at ¶ 33. Meshwerks acknowledged Toyota's designs in the title of each application, such as "3-Dimensional Models of 2004 Toyota Camry." *See* Meshwerks Registration, at App. 62. Based on the information and documentation submitted, the Copyright Office issued registrations for each of Meshwerks' Digital Models, creating a "presumption of originality" in those computer programs. *Skyy Spirits*, 225 F.3d at 1075.

B. The Computer Programs Embody Meshwerks' Own Code Selections

In support thereof, Meshwerks' computer programs are copyrightable because they involve original selections of computer code, even though certain elements thereof may correspond to the dimensions of existing physical objects. While the Court has noted that the underlying facts may not be copyrightable, "original compilations of facts generally are." *Feist*, 499 U.S. at 344 (1991). Likewise, decisions "as to selection and arrangement, so long as they are made independently by the compiler and entail a *minimal degree of creativity*, are sufficiently original." *Id.* (emphasis added). Moreover, while "the copyright in a factual compilation is thin," *Feist*, 499 U.S. at 349, it is a copyright nonetheless, and is sufficient to protect

against verbatim copying of the original compilation. *See id.*

C. Meshwerks' Selection of Program Code Was Original and Creative

Each Meshwerks' program is, *inter alia*, an original, creative selection of instructions that, when rendered to the human eye through a computer, appear as three-dimensional images of Toyota vehicles. Meshwerks' computer programs are original because Meshwerks – not Toyota – selected the program code. In addition, Meshwerks' programs are creative because its selection of code was the product of its artistic judgment used to achieve a visually convincing result.

Assuredly, Meshwerks intended to create a computer program for generating screen images with the appearance of Toyota vehicles – which is what digital modelers do. However, because of the human touch and decision-making involved, *different modelers will create distinct program code even if they are modeling the same object*. *See* Scheidle Decl. at ¶ 27 (App. 60).

While different digital models of the same object might generate similar screen images; the result is analogous to generating substantially similar video game displays with different underlying computer code, *e.g.*, *Stern Electronics*, 669 F.2d at 855-57, and to creating original computer programs that generate the same visible typeface. *See* 57 Fed. Reg. 6201, at

App. 48-49. Thus, Meshwerks' computer programs are not merely "a medium shift" of real-world objects into digital form. *See* Tenth Circuit Opinion, App. 21 n.10. In contrast, Meshwerks' computer programs include "identifiable original contribution[s]" which make them copyrightable. *Bridgeman Art Library, Ltd. v. Corel Corp.*, 36 F. Supp. 2d 191, 199 (S.D. N.Y. 1999)).

D. Meshwerks' Computer Programs Are Not "Copies of Facts"

The Tenth Circuit also compared the Digital Models to unprotected "copies of facts in the world." *See* Opinion, App. 19. However, Meshwerks computer programs are not copies of the Toyota vehicles, but were independently created by Meshwerks, and involved numerous decisions on to how best depict those real-world objects in a digital fashion, using the least amount of digital information. *See* Scheidle Decl. at ¶ 20 (App. 59).

1. The Tenth Circuit's Reliance on *Sparaco* Is Misplaced

Given Meshwerks' original and creative work, the Tenth's Circuit reliance on the case of *Sparaco v. Lawler, Matusky, Skelly, Engineers LLP*, 303 F.3d 460 (2d Cir. 2002) is misplaced. *See* Opinion, App. 19. First, the "site plan" in *Sparaco* was registered "under the copyright category of a 'map' and 'technical drawing'", not as a computer program. *Id.* at 463. Consequently, only its visible image was claimed to be

copyrighted. In contrast, the issue here is not whether Meshwerks has a copyright in the visual images of the Toyota vehicles it modeled, but rather in the underlying original computer code.

Second, *Sparaco* did not hold that the representation of physical characteristics would *never* be copyrightable. In contrast, *Sparaco* explained that, "[a]lthough a mapmaker is not protected from copying of the factual information conveyed in the map, she is protected from the copying of *any originality in the manner of expression employed in communicating the factual information.*" *Id.* at 467 (emphasis added). Thus, even representations of existing physical features are copyrightable so long as they include original expression.

2. Copyright Protects Digital Representations Involving Decisions About What Is Depicted and How

In fact, another court recently came to right result in a similar case, using the *Sparaco* reasoning. *See City of New York v. Geodata Plus, LLC*, 537 F. Supp. 2d 443, 451-452 (E.D. N.Y. 2007). In *Geodata*, New York City had created digital geographic maps using existing tax lot maps and other documents, which the city had combined, edited and transformed into digital maps. *Id.* at 448. New York City applied for copyright registration on Form TX, and received registrations for its digital maps. *Id.* at 447. The defendant Geodata obtained copies of the

city's digital maps, added some additional features, and then sold them as its own. *Id.* at 449. As a result, New York City sued Geodata for copyright infringement. In turn, Geodata moved for summary judgment, arguing that the digital maps did not meet the "originality" requirement because they involved digitized versions of pre-existing tax block and lot maps, and depicted physical characteristics of the city. *Id.* at 450. However, the *Geodata* court disagreed, finding that the creators of those maps "made numerous independent decisions concerning the number and location of coordinates used to depict various shapes in the maps" and that "they made decisions concerning which features to incorporate and which to exclude." *Id.* at 451. As a result, the digital maps were sufficiently original, and therefore protected by copyright. *Id.* at 452.

3. Meshwerks' Digital Models Are Similarly Protected

Meshwerks' Digital Models are also protected under the reasoning in *Sparaco* and *Geodata* cases. Meshwerks' computer programs embody numerous decisions selecting and/or eliminating certain details of Toyota's vehicles. *See* Scheidle Decl. at ¶¶ 20-22, 24, 26, 28 (App. 59-60). For example, even with respect to the initial measurement stage, Meshwerks selected the line spacing and grid pattern, Scheidle Decl. at ¶ 3, chose to measure only half of each vehicle (mirroring the other half later during the modeling stage), *id.* at ¶ 18, and chose which vehicle parts not to

measure manually, *id.* at ¶ 24. During the subsequent modeling stage, Meshwerks also eliminated some of the measurements and added other details which it determined to be desirable. *Id.* at ¶¶ 21-22. Creating many parts from scratch, Meshwerks also selected underlying digital building blocks used for generating its desired images. *Id.* at ¶¶ 24-25. Ultimately, all of these original decisions are embodied in the underlying program code, which is unique to Meshwerks. In sum, Meshwerks' selection of code reflects its numerous artistic judgments regarding how "to create the illusion of three-dimensionality on a two-dimensional computer screen." *Id.* at ¶ 6.

The Tenth Circuit held that "in assessing the originality of a work for which copyright protection is sought, we look only at the final *product* not the process . . . " Opinion, App. 22 (emphasis in original). However, Meshwerks' underlying computer program – not the visual images of a Toyota vehicle – is the "product" which it registered for copyright. Consequently, the Tenth Circuit reached the wrong decision by failing to analyze what was actually created by Meshwerks.

E. Even If the Copyright for Digital Models Is "Thin", it Still Protects Against Verbatim Copying

The Tenth Circuit also noted that certain types of work, such as photographs of commercial objects, may create such "thin" copyrights that they can only be

infringed through verbatim copying. *See* Opinion, App. 16 (*citing Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 765 (9th Cir. 2003) (*Skyy II*)). However, even in such cases, the authors are still "entitled to copyright protection for the 'incremental contribution'" which is "represented by their interpretation or expression of the objects of their attention." *Id.* at App. 13 (*quoting SHL Imaging, Inc.*, 117 F. Supp. 2d at 311).

After finding that the photographs of the vodka bottle were protected by copyright in *Skyy Spirits,* the scope of that copyright was at issue in *Skyy II*, where the Ninth Circuit ruled that:

> Though the Ets-Hokin and Skyy photographs are indeed similar, their similarity is inevitable, given the shared concept, or idea, of photographing the Skyy bottle. When we apply the limiting doctrines, subtracting the unoriginal elements, Ets-Hokin is left with only a "thin" copyright, which protects against only virtual copying.

323 F.3d at 763. Consequently, the Ninth Circuit did not rule that plaintiff's photographs were unprotected, but rather that where "'[t]he range of protectable expression is narrow, the appropriate stand for illicit copying is virtual identity.'" *Id.* In contrast, because defendant's photographs differed "in as many ways as possible with the constraints of the commercial product shot", they did not infringe plaintiff's photographs. *Id.*

The Tenth Circuit's ruling contradicts the established law, because it held that Meshwerks' Digital Models *were not protected by copyright at all.* The copyright may be limited, in that Meshwerks cannot preclude others from making their own digital models of the Toyota vehicles – even if the images generated by the computer programs end up being similar. However, defendants made and used unauthorized *electronic* copies of Meshwerks' *actual* Digital Models, i.e., the original computer code evidencing those works. *See* Scheidle Decl. at ¶¶ 31-33. As noted by the Second Circuit, "[a] verbatim reproduction of another work, of course, even in the realm of nonfiction, is actionable as copyright infringement." *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980). That was also the holding in *SHL Imaging*, upon which the Tenth Circuit relied for its ruling. *See* 117 F. Supp. 2d at 311 ("Practically, the plaintiff's works are only protected from verbatim copying. However, that is precisely what defendants did.")

Interestingly, the Tenth Circuit recognized the inherent value of this new form of expression, finding that "Meshwerks' digital models were designed to serve as practically advantageous substitutes for photographs" of commercial objects in advertising. Opinion, at App. 13. In contrast, however, it refused such digital files any protection under the Copyright Act against verbatim copying by others.

CONCLUSION

The Tenth Circuit's ruling improperly denies copyright protection to a whole new field of computer-based expression. In reaching its decision, the Tenth Circuit erroneously focused on the *images* generated by Meshwerks' digital models – not the underlying *computer code,* which was actually registered for copyright. While copyright may be limited to the Digital Models' unique computer programs, that is all that Meshwerks and other digital modelers need to protect their original work against verbatim copying by others, such as occurred in this case. Likewise, such a copyright would not preclude any other party (such as Toyota) from making its own digital models. Consequently, the Court should grant Meshwerks' petition for writ of certiorari, to better address the effect of the Copyright Act on the developing use of digital modeling, and computer-based expression as a whole.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MESHWERKS, INC., a Utah corporation, Plaintiff-Appellant, v. TOYOTA MOTOR SALES U.S.A., INC., a California corporation; GRACE & WILD, a Michigan corporation doing business as Division X; 3D RECON, a Utah limited liability company; SAATCHI & SAATCHI NORTH AMERICA, a California corporation, Defendants-Appellees.	No. 06-4222

Appeal from the United States District Court for the District of Utah (D.C. No. 2:06-CV-97-TC)

(Filed June 17, 2008)

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Brian D. Wassom of Honigman Miller Schwartz and Cohn LLP, Detroit, Michigan (Michael A. Lisi of Honigman Miller Schwartz and Cohn LLP, Detroit, Michigan and Arthur B. Berger of Ray Quinney & Nebeker P.C., Salt Lake City, Utah, with him on the brief), for Defendants-Appellees Toyota Motor Sales, Inc., Grace & Wild, Inc. and Saatchi & Saatchi North America, Inc.

Stephen Quesenberry and J. Bryan Quesenberry of Hill, Johnson & Schmutz, Provo, Utah, for Defendant-Appellee 3D Recon, LLC.

Before **BRISCOE**, **GORSUCH**, and **HOLMES**, Circuit Judges.

GORSUCH, Circuit Judge.

This case calls on us to apply copyright principles to a relatively new technology: digital modeling. Meshwerks insists that, contrary to the district court's summary judgment determination, its digital models of Toyota cars and trucks are sufficiently original to warrant copyright protection. Meshwerks' models, which form the base layers of computerized substitutes for product photographs in advertising, are unadorned, digital wire-frames of Toyota's vehicles. While fully appreciating that digital media present new frontiers for copyrightable creative

expression, in this particular case the uncontested facts reveal that Meshwerks' models owe their designs and origins to Toyota and deliberately do not include anything original of their own; accordingly, we hold that Meshwerks' models are not protected by copyright and affirm.

I

A

In 2003, and in conjunction with Saatchi & Saatchi, its advertising agency, Toyota began work on its model-year 2004 advertising campaign. Saatchi and Toyota agreed that the campaign would involve, among other things, digital models of Toyota's vehicles for use on Toyota's website and in various other media. These digital models have substantial advantages over the product photographs for which they substitute. With a few clicks of a computer mouse, the advertiser can change the color of the car, its surroundings, and even edit its physical dimensions to portray changes in vehicle styling; before this innovation, advertisers had to conduct new photo shoots of whole fleets of vehicles each time the manufacturer made even a small design change to a car or truck.

To supply these digital models, Saatchi and Toyota hired Grace & Wild, Inc. ("G&W"). In turn, G&W subcontracted with Meshwerks to assist with two initial aspects of the project – digitization and modeling. Digitizing involves collecting physical data points from the object to be portrayed. In the case of

Toyota's vehicles, Meshwerks took copious measurements of Toyota's vehicles by covering each car, truck, and van with a grid of tape and running an articulated arm tethered to a computer over the vehicle to measure all points of intersection in the grid. Based on these measurements, modeling software then generated a digital image resembling a wire-frame model. In other words, the vehicles' data points (measurements) were mapped onto a computerized grid and the modeling software connected the dots to create a "wire frame" of each vehicle.

At this point, however, the on-screen image remained far from perfect and manual "modeling" was necessary. Meshwerks personnel fine-tuned or, as the company prefers it, "sculpted," the lines on screen to resemble each vehicle as closely as possible. Approximately 90 percent of the data points contained in each final model, Meshwerks represents, were the result not of the first-step measurement process, but of the skill and effort its digital sculptors manually expended at the second step. For example, some areas of detail, such as wheels, headlights, door handles, and the Toyota emblem, could not be accurately measured using current technology; those features had to be added at the second "sculpting" stage, and Meshwerks had to recreate those features as realistically as possible by hand, based on photographs. Even for areas that were measured, Meshwerks faced the challenge of converting measurements taken of a three-dimensional car into a two-dimensional computer representation; to achieve this, its modelers

had to sculpt, or move, data points to achieve a visually convincing result. The purpose and product of these processes, after nearly 80 to 100 hours of effort per vehicle, were two-dimensional wire-frame depictions of Toyota's vehicles that appeared three-dimensional on screen, but were utterly unadorned – lacking color, shading, and other details. Attached to this opinion as Appendix A are sample screen-prints of one of Meshwerks' digital wire-frame models.

With Meshwerks' wire-frame products in hand, G&W then manipulated the computerized models by, first, adding detail, the result of which appeared on screen as a "tightening" of the wire frames, as though significantly more wires had been added to the frames, or as though they were made of a finer mesh. Next, G&W digitally applied color, texture, lighting, and animation for use in Toyota's advertisements. An example of G&W's work product is attached as Appendix B to this opinion. G&W's digital models were then sent to Saatchi to be employed in a number of advertisements prepared by Saatchi and Toyota in various print, online, and television media.[1]

B

This dispute arose because, according to Meshwerks, it contracted with G&W for only a single use

[1] G&W also shared one of Meshwerks' original wire-frames with defendant 3D Recon, one of Meshwerks' competitors hired to work on a subsequent phase of Toyota's advertising campaign.

of its models – as part of one Toyota television commercial – and neither Toyota nor any other defendant was allowed to use the digital models created from Meshwerks' wire-frames in other advertisements. Thus, Meshwerks contends defendants improperly – in violation of copyright laws as well as the parties' agreement – reused and redistributed the models created by Meshwerks in a host of other media. In support of the allegations that defendants misappropriated its intellectual property, Meshwerks points to the fact that it sought and received copyright registration on its wire-frame models.[2]

In due course, defendants moved for summary judgment on the theory that Meshwerks' wire-frame models lacked sufficient originality to be protected by copyright. Specifically, defendants argued that any original expression found in Meshwerks' products was attributable to the Toyota designers who conceived of the vehicle designs in the first place; accordingly, defendants' use of the models could not give rise to a claim for copyright infringement.

The district court agreed. It found that the wire-frame models were merely copies of Toyota's products, not sufficiently original to warrant copyright protection, and stressed that Meshwerks' "intent was to

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[2] An initial suit for copyright infringement was dismissed without prejudice because Meshwerks had not obtained registrations for all of the copyrights it claimed defendants infringed. Meshwerks subsequently registered the copyrights at issue and filed this suit.

replicate, as exactly as possible, the image of certain Toyota vehicles." D. Ct. Op. at 8. Because there was no valid copyright, there could be no infringement, and, having granted summary judgment on the federal copyright claim, the district court declined to exercise supplemental jurisdiction over Meshwerks' state-law contract claim. Today, Meshwerks asks us to reverse and hold its digital, wire-frame models sufficiently original to warrant copyright protection.[3]

II

To make a case for copyright infringement, Meshwerks must show (1) it owns a valid copyright, and (2) defendants copied constituent elements of the work that are original to Meshwerks. *Autoskill Inc. v. Nat'l Educ. Support Sys., Inc.*, 994 F.2d 1476, 1487 (10th Cir. 1993). Our inquiry in this case focuses on the first of these tests – that is, on the question whether Meshwerks held a valid copyright in its digital wire-frame models. Because Meshwerks obtained registration certificates for its models from the Copyright Office, we presume that it holds a valid copyright. *See* 17 U.S.C. § 410(c); *Palladium Music, Inc. v. EatSleepMusic, Inc.*, 398 F.3d 1193, 1196 (10th Cir. 2005). At the same time, defendants may overcome this presumption by presenting evidence and

[3] On appeal, we have not been asked to address Meshwerks' contract claim, though if the holding on its federal claim were to be reversed, the existence of supplemental jurisdiction to review the contract claim of course would have to be reconsidered.

legal argument sufficient to establish that the works in question were not entitled to copyright protection. *Palladium Music, Inc.*, 398 F.3d at 1196. Because this case comes to us on summary judgment, we review the question whether Meshwerks holds a valid copyright *de novo* and will affirm the district court's judgment only if, viewing all of the facts in the light most favorable to Meshwerks, we are able to conclude that "there is no genuine issue as to any material fact and that [defendants are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).[4]

A

The Constitution authorizes Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. The Supreme Court has emphasized that the power afforded by this provision – namely, to give an author exclusive authority over a work – rests in part on a

[4] There is some debate over whether the question of copyrightability is a pure question of law and thus one for the court, or a mixed question of law and fact and thus one involving potential jury questions in the presence of materially disputed facts. *See Gaiman v. McFarlane*, 360 F.3d 644, 648-49 (7th Cir. 2004) (discussing the dispute). Our court has not spoken on the matter, but neither do we have need to do so today as this case comes to us on summary judgment, and we cannot, of course, grant such a motion if we discern any material dispute of fact in the record before us.

"presuppos[ition]" that the work contains "a degree of originality." *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 346 (1991). Congress has recognized this same point, extending copyright protection only to "*original works* of authorship. . . ." 17 U.S.C. § 102 (emphasis added). Originality, thus, is said to be "[t]he *sine qua non* of copyright." *Feist*, 499 U.S. at 345. That is, not every work of authorship, let alone every aspect of every work of authorship, is protectable in copyright; only original expressions are protected. This constitutional and statutory principle seeks to strike a delicate balance – rewarding (and thus encouraging) those who contribute something new to society, while also allowing (and thus stimulating) others to build upon, add to, and develop those creations. The copyright power is said to exist primarily "not to reward the labor of authors, but to promote the progress of science and the useful arts. . . . To this end, copyright assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work." *Id.* at 349-50 (internal quotation and citations omitted).

What exactly does it mean for a work to qualify as "original"? In *Feist*, the Supreme Court clarified that the work must be "independently created by the author (as opposed to copied from other works)." *Id.* at 345; *see also Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884) (the work for which copyright protection is sought must "owe[ ] its origin" to the putative copyright holder) (internal quotation

omitted). In addition, the work must "possesses at least some minimal degree of creativity," *Feist,* 499 U.S. at 345; *see also* William F. Patry, Patry on Copyright § 3:27 ("both independent creation *and* a minimal degree of creativity are required"), though this is not to say that to count as containing a minimal degree of creativity a work must have aesthetic merit in the minds of judges (arguably not always the most artistically discerning lot). As the Court explained through Justice Holmes, even "a very modest grade of art has in it something irreducible, which is one man's alone. That something he may copyright. . . ." *Bleistein v. Donaldson Lithographing Co.,* 188 U.S. 239, 250 (1903); *see also Feist,* 499 U.S. at 345 (all that's needed is some creative spark, "no matter how crude, humble, or obvious").[5]

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[5] The two pertinent concepts – independent creation and minimal creativity – are intertwined and overlap, at least to some degree: After all, if something qualifies as an independent creation (that is, it is more than a copy) won't it also usually betray some minimal degree of creativity? Still, though the independent test imputed by the creativity requirement is low, it does exist. *Feist,* 499 U.S. at 345, 362. It is thus not the case, as some interpreted Judge Learned Hand to say when he observed that "'no photograph, however simple, can be unaffected by the personal influence of the author, and no two will be absolutely alike,'" that photographs (or any other works, for that matter) are *per se* protectable. *See SHL Imaging, Inc. v. Artisan House, Inc.,* 117 F. Supp. 2d 301, 309 (S.D.N.Y. 2000) (quoting *Jewelers' Circular Publ'g Co. v. Key-Stone Publ'g Co.,* 274 F. 932, 934 (S.D.N.Y. 1921) (Hand, J.)).

The parties focus most of their energy in this case on the question whether Meshwerks' models qualify as independent creations, as opposed to copies of Toyota's handiwork. But what can be said, at least based on received copyright doctrine, to distinguish an independent creation from a copy? And how might that doctrine apply in an age of virtual worlds and digital media that seek to mimic the "real" world, but often do so in ways that undoubtedly qualify as (highly) original? While there is little authority explaining how our received principles of copyright law apply to the relatively new digital medium before us, some lessons may be discerned from how the law coped in an earlier time with a previous revolution in technology: photography.

As Judge Pauley admirably recounted in *SHL Imaging, Inc. v. Artisan House, Inc.*, photography was initially met by critics with a degree of skepticism: a photograph, some said, "copies everything and explains nothing," and it was debated whether a camera could do anything more than merely record the physical world. 117 F. Supp. 2d 301, 307 (S.D.N.Y. 2000) (internal quotation omitted). These largely aesthetic debates migrated into legal territory when Oscar Wilde toured the United States in the 1880s and sought out Napoleon Sarony for a series of publicity photographs to promote the event.[6] Burrow-Giles, a

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[6] The tour brought Wilde within what is now our territorial jurisdiction in 1882, including to the bustling silver mining town of Leadville, Colorado, where Wilde descended into Horace

(Continued on following page)

lithography firm, quickly copied one of Sarony's photos and sold 85,000 prints without the photographer's permission. Burrow-Giles defended its conduct on the ground that the photograph was a "mere mechanical reproduction of the physical features" of Wilde and thus not copyrightable. *Burrow-Giles,* 111 U.S. at 59. Recognizing that Oscar Wilde's inimitable visage does not belong, or "owe its origins" to any photographer, the Supreme Court noted that photographs may well sometimes lack originality and are thus not *per se* copyrightable. *Id.* ("the ordinary production of a photograph" may involve "no protection" in copyright). At the same time, the Court held, a copyright may be had to the extent a photograph involves "posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression. . . ." *Id.* at 60. Accordingly, the Court indicated, photographs are copyrightable, if only to the extent of their *original* depiction of the subject. Wilde's image is not copyrightable; but to the extent a photograph reflects

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Tabor's Matchless Mine and later claimed, "I read [assembled miners] passages from the autobiography of Benvenuto Cellini and they seemed much delighted. I was reproved by my hearers for not having brought him with me. I explained that he had been dead for some little time which elicited the enquiry 'Who shot him?'" Oscar Wilde, *Impressions of America* 31 (Keystone Press 1906).

the photographer's decisions regarding pose, positioning, background, lighting, shading, and the like, those elements can be said to "owe their origins" to the photographer, making the photograph copyrightable, at least to that extent.

As the Court more recently explained in *Feist,* the operative distinction is between, on the one hand, ideas or facts in the world, items that cannot be copyrighted, and a particular expression of that idea or fact, that can be. "This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship. As applied to a factual compilation," the particular matter at issue in *Feist,* "assuming the absence of original written expression, only the compiler's selection and arrangement may be protected; the raw facts may be copied at will. This result is neither unfair nor unfortunate. It is the means by which copyright advances the progress of science and art." *Feist,* 499 U.S. at 350; *see also id.* at 351 ("In no event may copyright extend to the facts themselves."). So, in the case of photographs, for which Meshwerks' digital models were designed to serve as practically advantageous substitutes, authors are entitled to copyright protection only for the "incremental contribution," *SHL Imaging, Inc.,* 117 F. Supp. 2d at 311 (internal quotation omitted), represented by their interpretation or expression of the objects of their attention.

B

Applying these principles, evolved in the realm of photography, to the new medium that has come to supplement and even in some ways to supplant it, we think Meshwerks' models are not so much independent creations as (very good) copies of Toyota's vehicles. In reaching this conclusion we rely on (1) an objective assessment of the particular models before us and (2) the parties' purpose in creating them. All the same, we do not doubt for an instant that the digital medium before us, like photography before it, can be employed to create vivid new expressions fully protectable in copyright.

1

Key to our evaluation of this case is the fact that Meshwerks' digital wire-frame computer models depict Toyota's vehicles without any individualizing features: they are untouched by a digital paintbrush; they are not depicted in front of a palm tree, whizzing down the open road, or climbing up a mountainside. Put another way, Meshwerks' models depict nothing more than unadorned Toyota vehicles – the car *as* car. *See* Appendix A. And the unequivocal lesson from *Feist* is that works are not copyrightable to the extent they do not involve any expression apart from the raw facts in the world. As Professor Nimmer has commented in connection with the predecessor technology of photography, "[a]s applied to a photograph of a pre-existing product, that bedrock principle [of

originality] means that the photographer manifestly cannot claim to have originated the matter depicted therein. . . . The upshot is that the photographer is entitled to copyright solely based on lighting, angle, perspective, and the other ingredients that traditionally apply to that art-form." Nimmer on Copyright § 3.03[C][3]. It seems to us that exactly the same holds true with the digital medium now before us: the facts in this case unambiguously show that Meshwerks did not make any decisions regarding lighting, shading, the background in front of which a vehicle would be posed, the angle at which to pose it, or the like – in short, its models reflect none of the decisions that can make depictions of things or facts in the world, whether Oscar Wilde or a Toyota Camry, new expressions subject to copyright protection.

The primary case on which Meshwerks asks us to rely actually reinforces this conclusion. In *Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068 (9th Cir. 2000) (*Skyy I*), the Ninth Circuit was faced with a suit brought by a plaintiff photographer who alleged that the defendant had infringed on his commercial photographs of a Skyy-brand vodka bottle. The court held that the vodka bottle, as a "utilitarian object," a fact in the world, was not itself (at least usually) copyrightable. *Id.* at 1080 (citing 17 U.S.C. § 101). At the same time, the court recognized that plaintiff's photos reflected decisions regarding "lighting, shading, angle, background, and so forth," *id.* at 1078, and to the extent plaintiff's photographs reflected such original contributions the court held they could be

copyrighted. In so holding, the Ninth Circuit reversed a district court's dismissal of the case and remanded the matter for further proceedings, and Meshwerks argues this analysis controls the outcome of its case.

But *Skyy I* tells only half the story. The case soon returned to the court of appeals, and the court held that the defendant's photos, which differed in terms of angle, lighting, shadow, reflection, and background, did *not* infringe on the plaintiff's copyrights. *Ets-Hokin v. Skyy Spirits, Inc.*, 323 F.3d 763, 765 (9th Cir. 2003) (*Skyy II*). Why? The only constant between the plaintiff's photographs and the defendant's photographs was the bottle itself, *id.* at 766, and an accurate portrayal of the unadorned bottle could not be copyrighted. Facts and ideas are the public's domain and open to exploitation to ensure the progress of science and the useful arts. Only original expressions of those facts or ideas are copyrightable, leaving the plaintiff in the *Skyy* case with an admittedly "thin" copyright offering protection perhaps only from exact duplication by others. *Id.*; *see also SHL Imaging, Inc.*, 117 F. Supp. 2d at 311 ("Practically, the plaintiffs [photos] are only protected from verbatim copying.").

The teaching of *Skyy* I and II, then, is that the vodka bottle, because it did not owe its origins to the photographers, had to be filtered out to determine what copyrightable expression remained. And, by analogy – though not perhaps the one Meshwerks had in mind – we hold that the unadorned images of Toyota's vehicles cannot be copyrighted by Meshwerks and likewise must be filtered out. To the extent

that Meshwerks' digital wire-frame models depict only those unadorned vehicles, having stripped away all lighting, angle, perspective, and "other ingredients" associated with an original expression, we conclude that they have left no copyrightable matter.[7]

Confirming this conclusion as well is the peculiar place where Meshwerks stood in the model-creation pecking order. On the one hand, Meshwerks had nothing to do with designing the appearance of

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[7] The *Skyy I* panel also faulted the district court for analyzing the photographs as "derivative works," requiring (a) nontrivial differences between the photos and bottle and (b) that copyright in the photo would not interfere with Skyy's ability to use its own bottle. *See Skyy I*, 225 F.3d at 1073. A derivative work is based on a pre-existing copyrighted work and seeks to recast, transform, or adapt that original work. 17 U.S.C. § 101. Meshwerks argues that the originality requirement is "higher" for derivative works, that the district court erroneously applied this standard here, and that cases analyzing originality in derivative works are generally inapposite. In our *de novo* review, however, we have simply applied the Supreme Court's originality directives set out in *Feist*. And it appears to us that the courts in derivative works cases, *see, e.g., ATC Distr. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700, 712 (6th Cir. 2005); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 490-92 (2d Cir. 1976), just like the court in *Skyy II*, also had to separate out that which owed its origin to the putative copyright holder from that which did not, holding only the former copyrightable. In *then* examining the elements that are original to the author, the originality analysis ought to be the same. Patry on Copyright § 3:50 ("[T]he standard of originality for derivative works is no different than for nonderivative works."); *id.* § 3:55 ("Under the Supreme Court's *Feist* opinion, there is a single test for originality applicable to all works, derivative and nonderivative alike.").

Toyota's vehicles, distinguishing them from any other cars, trucks, or vans in the world. That expressive creation took place *before* Meshwerks happened along, and was the result of work done by Toyota and its designers; indeed, at least six of the eight vehicles at issue are still covered by design patents belonging to Toyota and protecting the *appearances* of the objects for which they are issued. *See* 35 U.S.C. § 171; *Gorham Mfg. Co. v. White,* 81 U.S. 511, 525 (1871) ("It is the appearance itself, no matter by what agency caused, that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense."). On the other hand, how the models Meshwerks created were to be deployed in advertising – including the backgrounds, lighting, angles, and colors – were all matters left to those (G&W, Saatchi, and 3D Recon) who came *after* Meshwerks left the scene. *See infra* Section II.C. Meshwerks thus played a narrow, if pivotal, role in the process by simply, if effectively, copying Toyota's vehicles into a digital medium so they could be expressively manipulated by others.[8]

Were we to afford copyright protection in this case, we would run aground on one of the bedrock principles of copyright law – namely, that originality, "as the term is used in copyright, means only that the work was independently created by the author (*as*

[8] We are not called upon to, and do not, express any view on the copyrightability of the work products produced by those who employed and adorned Meshwerks' models.

opposed to copied from other works)." *Feist,* 499 U.S. at 345 (emphasis added). Because our copyright laws protect only "original" expression, the reason for refusing copyright protection to copies is clear, "since obviously a copier is not a creator, much less an 'independent' creator." Patry on Copyright § 3:28; *see also id.* ("The key is whether original matter in which protection is claimed is the result of plaintiff's ingenuity rather than appropriation of another's material."). As it happens, many other courts before us have denied copyright protection in analogous cases, involving copies of facts in the world, as well as copies of prior works of art. So, for example, in *Sparaco v. Lawler, Matusky, Skelly, Engineers LLP,* 303 F.3d 460, 467 (2d Cir. 2002), our sister circuit, relying on *Feist,* denied copyright protection to that portion of an architectural drawing setting forth "the existing physical characteristics of the site, including its shape and dimensions, the grade contours, and the location of existing elements, [as] it sets forth facts; copyright does not bar the copying of such facts." Much the same might be said here. *See also ATC Distr. Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.,* 402 F.3d 700, 712 (6th Cir. 2005) (denying copyright protection to catalog illustrations of transmission parts "copied from photographs cut out of competitors' catalogs"); *Bridgeman Art Library, Ltd. v. Corel Corp.,* 36 F. Supp. 2d 191, 197 (S.D.N.Y. 1999) (denying copyright protection to photographs that were "'slavish copies' of public domain works of art"); Mary Campbell Wojcik, *The Antithesis of Originality*: Bridgeman, *Image Licensors, and the Public*

Domain, 30 Hastings Comm. & Ent. L. J. 257, 267 (2008) ("[T]he law is becoming increasingly clear: one possesses no copyright interest in reproductions . . . when these reproductions do nothing more than accurately convey the underlying image.").[9]

It is certainly true that what Meshwerks accomplished was a peculiar kind of copying. It did not seek to recreate Toyota vehicles outright – steel, rubber, and all; instead, it sought to depict Toyota's three-dimensional physical objects in a two-dimensional digital medium. But we hold, as many before us have already suggested, that, standing alone, "[t]he fact that a work in one medium has been copied from a work in another medium does not render it any the less a 'copy.'" Nimmer on Copyright § 8.01[B]; *see also Durham Indus., Inc. v. Tomy Corp.*, 630 F.2d 905, 910 (2d Cir. 1980) (holding that "the mere reproduction of the Disney characters in plastic . . . does not constitute originality as this Court has defined the term");

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[9] We are not convinced that the single case to which we are pointed where copyright was awarded for a "slavish copy" remains good law after *Feist.* In *Alva Studios, Inc. v. Winninger,* 177 F. Supp. 265 (S.D.N.Y. 1959), the court held that a miniature reproduction of Rodin's "Hand of God" was copyrightable because of the great skill it took accurately to replicate Rodin's masterpiece. *Feist,* however, rejected the notion that skill and hard work suffice for copyright protection, 499 U.S. at 359-60, undermining the very foundation for the holding in *Alva Studios. See* Patry on Copyright § 3:56 ("*Alva* appears to have protected labor – albeit labor by a skilled artisan – but still only labor, not judgment. *Alva* is inconsistent with the Supreme Court's opinion in *Feist.*").

Entm't Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1221-24 (9th Cir. 1997) (denying copyright protection to 3-D costumes based on 2-D cartoon characters). After all, the putative creator who merely shifts the medium in which another's creation is expressed has not necessarily added anything beyond the expression contained in the original. *See Bridgeman Art Library, Ltd.*, 36 F. Supp. 2d at 199 (noting that "a copy in a new medium is copyrightable only where, as often but not always is the case, the copier makes some identifiable original contribution").[10]

In reaching this conclusion, we do not for a moment seek to downplay the considerable amount of time, effort, and skill that went into making

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[10] The single case Meshwerks cites to us as suggesting that a medium shift alone is sufficient to warrant copyright protection does not alter our conclusion on this score. There, a series of three-dimensional works of art translated from two-dimensional sketches were held copyrightable based on the artist's "creative effort." *W. Goebel Porzellanfabrik v. Action Indus., Inc.*, 589 F. Supp. 763, 767 (S.D.N.Y. 1984). This case pre-dated *Feist*, and it is unclear whether it remains good law. In *Feist*, the Supreme Court specifically eschewed the notion that effort alone was enough to make the resultant work "original" and therefore the proper subject of copyright protection. *See Feist*, 499 U.S. at 359-60; *see also supra* note 9. Moreover, and as discussed in greater detail below, creative decision-making in the *process* is insufficient to render the *product* original. *Cf.* Nimmer on Copyright § 3.03[C][2] (stating that a district court erred in another case "in holding that the mere act of converting a public domain Santa Claus figure into a three-dimensional plastic form constituted sufficient originality").

Meshwerks' digital wire-frame models. But, in assessing the originality of a work for which copyright protection is sought, we look only at the final *product,* not the process, and the fact that intensive, skillful, and even creative labor is invested in the process of creating a product does not guarantee its copyrightability. *See Feist,* 499 U.S. at 359-60; Howard B. Abrams, Law of Copyright § 2:8 ("Even if the *process* is both expensive and intricate, an exact or near-exact duplicate of an original should not qualify for copyright.") (emphasis added); Wojcik, *supra,* 30 Hastings Comm. & Ent. L. J. at 267 ("This is not to say that [accurately reproducing an underlying image] requires no skill or effort; it simply means that such skill and effort does not suffice to invoke the highly advantageous legal monopoly granted under the Copyright Act."). In the case before us, there is no doubt that transposing the physical appearances of Toyota's vehicles from three dimensions to two, such that computer-screen images accurately reflect Toyota's products, was labor intensive and required a great amount of skill. But because the end-results were unadorned images of Toyota's vehicles, the appearances of which do not owe their origins to Meshwerks, we are unable to reward that skill, effort, and labor with copyright protection.

2

Meshwerks' intent in making its wire-frame models provides additional support for our conclusion. "In theory, the originality requirement tests the

putative author's state of mind: Did he have an earlier work in mind when he created his own?" Paul Goldstein, Goldstein on Copyright § 2.2.1.1. If an artist affirmatively sets out to be unoriginal – to make a copy of someone else's creation, rather than to create an original work – it is far more likely that the resultant product will, in fact, be unoriginal. *See* Russ VerSteeg, *Intent, Originality, Creativity and Joint Authorship,* 68 Brook. L. Rev. 123, 133 (2002) ("[A] person's intent to copy . . . should be considered strong evidence that what that person has produced is not copyrightable."). Of course, this is not to say that the accidental or spontaneous artist will be denied copyright protection for not intending to produce art; it is only to say that authorial intent sometimes can shed light on the question of whether a particular work qualifies as an independent creation or only a copy.

In this case, the undisputed evidence before us leaves no question that Meshwerks set out to copy Toyota's vehicles, rather than to create, or even to add, any original expression. The purchase order signed by G&W asked Meshwerks to "digitize and model" Toyota's vehicles, and Meshwerks' invoice submitted to G&W for payment reflects that this is exactly the service Meshwerks performed. Aplt's App. at 113, 115. Meshwerks itself has consistently described digitization and modeling as an attempt accurately to depict real-world, three-dimensional objects as digital images viewable on a computer screen. *See, e.g., id.* at 369 ("the graphic sculptor is

not intending to 'redesign' the product, he or she is attempting to depict that object in the most realistic way"); *id.* at 370 (goal is "to create a realistic depiction on the computer screen"); *id.* at 378 ("Meshwerks' graphic sculptors [] create realistic-looking depictions of complicated real-world objects on a two dimensional screen . . . a digital representation of the real object"); *id.* at 455 (Meshwerks "basically draws a three dimensional rendering of that object in the computer . . . it closely resembles the original"). The parties thus intended to have Meshwerks create base-layer digital models to which the original and creative elements viewers would see in actual advertisements could be added by others in subsequent processes.

Other courts before us have examined and relied on a putative copyright holder's intent in holding that the resultant work was not original and thus subject to copyright protection. The Sixth Circuit, for example, held that a series of catalog illustrations depicting auto transmission parts were not independently copyrightable. *ATC Distrib. Group, Inc,* 402 F.3d at 712. The drawings had been copied by hand from photographs in a competitor's catalog. *Id.* In denying copyright protection, the court emphasized that "[t]he illustrations were *intended* to be as accurate as possible in reproducing the parts shown in the photographs on which they were based, a form of slavish copying that is the antithesis of originality." *Id.* (emphasis added). In *Bridgeman Art Library,* the court examined whether color transparencies of public domain works of art were sufficiently original

for copyright protection, ultimately holding that, as "exact photographic copies of public domain works of art," they were not. 36 F. Supp. 2d at 195. In support of its holding, the court looked to the plaintiff's intent in creating the transparencies: where "the *point of the exercise* was to reproduce the underlying works with absolute fidelity," the "spark of originality" necessary for copyright protection was absent. *Id.* at 197 (emphasis added). Precisely the same holds true here, where, by design, all that was left in Meshwerks' digital wireframe models were the designs of Toyota's vehicles.

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Although we hold that Meshwerks' digital, wireframe models are insufficiently original to warrant copyright protection, we do not turn a blind eye to the fact that digital imaging is a relatively new and evolving technology and that Congress extended copyright protection to "original works of authorship fixed in any tangible medium of expression, *now known or later developed.*" 17 U.S.C. § 102(a) (emphasis added). A Luddite might make the mistake of suggesting that digital modeling, as was once said of photography, allows for nothing more than "mechanical reproduction of the physical features or outlines of some object . . . and involves no originality of thought or any novelty in the intellectual operation connected with its visible reproduction in [the] shape of a picture." *Burrow-Giles,* 111 U.S. at 59. Clearly, this is not so.

Digital modeling can be, surely is being, and no doubt increasingly will be used to create

copyrightable expressions. Yet, just as photographs *can be*, but are not *per se*, copyrightable, the same holds true for digital models. There's little question that digital models *can* be devised of Toyota cars with copyrightable features, whether by virtue of unique shading, lighting, angle, background scene, or other choices. The problem for Meshwerks in this particular case is simply that the uncontested facts reveal that it wasn't involved in any such process, and indeed contracted to provide completely unadorned digital replicas of Toyota vehicles in a two-dimensional space. For this reason, we do not envision any "chilling effect" on creative expression based on our holding today, and instead see it as applying to digital modeling the same legal principles that have come, in the fullness of time and with an enlightened eye, to apply to photographs and other media.[11]

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[11] Defendants' request for the costs and attorneys fees associated with this appeal is denied. *See* 17 U.S.C. § 505 (allowing reasonable fees and costs at the court's discretion). Non-exclusive factors that may guide a court's exercise of its discretion include the "frivolousness, motivation, objective unreasonableness (both in the factual and in the legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence." *Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 534 n.19 (1994). Far from being frivolous, this suit presents a novel and consequential question focused on the copyrightability of images in a relatively new technological medium. Neither are we presented with evidence suggesting that Meshwerks' motivation in filing this suit was anything other than sincere.

Originality is the *sine qua non* of copyright. If the basic design reflected in a work of art does not owe its origin to the putative copyright holder, then that person must add something original to that design, and then only the original addition may be copyrighted. In this case, Meshwerks copied Toyota's designs in creating digital, wire-frame models of Toyota's vehicles. But the models reflect, that is, "express," no more than the depiction of the vehicles *as* vehicles. The designs of the vehicles, however, owe their origins to Toyota, not to Meshwerks, and so we are unable to reward Meshwerks' digital wire-frame models, no doubt the product of significant labor, skill, and judgment, with copyright protection. The judgment of the district court is affirmed, and defendants' request for attorneys' fees is denied.

So ordered.

APPENDIX A

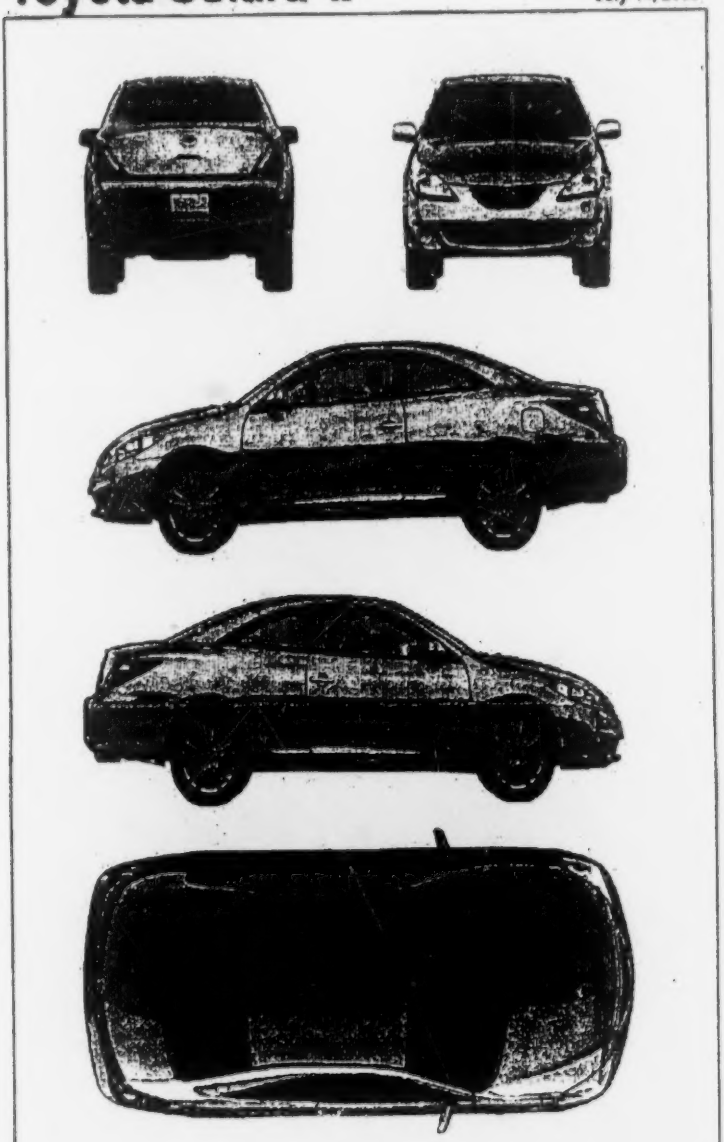
06-4222, Meshwerks v. Toyota

APPENDIX B

06-4222, Meshwerks v. Toyota

Toyota Solara SE

July 14, 2003



UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MESHWERKS, a Utah corporation,

Plaintiff-Appellant,

v.

TOYOTA MOTOR SALES U.S.A., INC., a California corporation; GRACE & WILD, a Michigan corporation doing business as Division X; 3D RECON, a Utah limited liability company; SAATCHI & SAATCHI NORTH AMERICA, a California corporation,

Defendants-Appellees.

No. 06-4222
(D.C. No. 2:06-CV-97-TC)

JUDGMENT

(Filed Jun. 17, 2008)

Before **BRISCOE, GORSUCH,** and **HOLMES,** Circuit Judge.

This case originated in the District of Utah and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES COURT
FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

MESHWERKS, INC., a Utah corporation, Plaintiff, vs. TOYOTA MOTOR SALES U.S.A., INC., a California corporation, GRACE & WILD, INC., d/b/a "DIVISION X," a Michigan corporation, 3D RECON, L.L.C., a Utah limited liability company, SAATCHI & SAATCHI NORTH AMERICA, INC., a California corporation, and JOHN DOES 1-10, Defendants.	ORDER & MEMORANDUM DECISION Case No. 2:06 CV 97

This motion raises the question of whether copyright law protects three-dimensional digital models of commercial products when the digital models are intended to resemble the commercial product as closely as possible. Plaintiff Meshwerks, Inc., was hired by Defendant Grace & Wild, Inc. to create digital models of several Toyota vehicles. After completing the project, Meshwerks obtained copyright

registration certificates covering the models. Meshwerks contends that Defendants Toyota Motor Sales U.S.A., Inc., Grace & Wild, 3D Recon, L.L.C., and Saatchi & Saatchi North America, Inc. (collectively, the "Toyota Defendants") violated Meshwerks's copyright by impermissibly using the models that Meshwerks created. Meshwerks also alleges that Grace & Wild failed to fully pay Meshwerks for the digital modeling that it performed.

The Toyota Defendants have moved for summary judgment on Meshwerks's copyright infringement claims, asserting that the digital models created by Meshwerks are not copyrightable. Further, the Toyota Defendants argue that, should they succeed on their motion for summary judgment, the court should decline to exercise supplemental jurisdiction over Meshwerks's remaining state law claim for breach of contract. The court agrees with the Toyota Defendants' position and therefore grants the motion for summary judgment and declines to exercise supplemental jurisdiction over Meshwerks's breach of contract claim.

Background

As part of its advertising strategy, Toyota Motor Sales and its advertising agent, Saatchi & Saatchi sought out a company to create three-dimensional animated images of several Toyota vehicles. Toyota planned on using the models on the Internet and in several other types of promotional media. Saatchi &

Saatchi contacted Grace & Wild and asked it to develop the images. Grace & Wild, in turn, hired Meshwerks to create three-dimensional digital models of the Toyota vehicles that would be used to create the final images.

The parties present different descriptions of the digital-modeling process. The Toyota Defendants assert that the use of off-the-shelf computer software enables the quick creation of product-accurate models. In contrast, Meshwerks claims that computer software is used to create an initial rough sketch of an object, but that "the skill and creativity of the graphic sculptor," who uses computer software as a tool, creates the final product. (Plf.'s Memo. in Opp'n to the Toyota Defs. Mot. for Part. Summ. J. ii (dkt. #19).)

Meshwerks began the modeling process by measuring the physical distance between designated points on each Toyota vehicle. To accomplish this task, Meshwerks placed tape in a grid pattern over each car and then, using an articulated arm measuring over six feet, marked each point at which the tape intersected. The distance between the points of intersection was then measured and inputted into a computer. Using the measurements as a guide, the computer software then created lines that formed a

rough digital representation of the vehicle, resembling a wireframe model.[1]

According to Meshwerks, the individual creating the digital model must manipulate the data initially obtained from the vehicle measurements to effectively create the illusion of a three-dimensional image on a two-dimensional screen in the most efficient manner possible. Given the necessity of manipulating the data obtained through measurement alone, Meshwerks disputes the Toyota Defendants' characterization of the final digital models as absolutely product accurate. In fact, Meshwerks contends that truly product-accurate models would be worthless because they would not create the desired three-dimensional effect. In short, Meshwerks asserts that the modeling process is a creative one, and that the creative nature of the process is borne out by the fact that no two digital models of an object will be exactly alike.

After finishing the Vehicle models, Meshwerks provided the digital files to Saatchi & Saatchi. Meshwerks also made a print-out of the data comprising each of the digital files and sought copyright protection of the material, claiming that the print-outs represented copyrightable non-dramatic literary works or computer programs. The United States

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[1] According to Meshwerks, some components of the vehicles, such as the vehicles' headlights, could not be measured. Meshwerks took photographs of those components and then, using the photographs for reference, created the wireframe model of the components from scratch.

Copyright Office issued copyright registration certificates to Meshwerks covering the submitted files.

Meshwerks's copyright infringement claim is based on Meshwerks's belief that the digital models it created have been distributed among the Toyota Defendants and that those models have been used repeatedly without Meshwerks's permission. The Toyota Defendants claim that summary judgment on Meshwerks's copyright infringement claims is warranted because the digital models are not entitled to copyright protection.

Summary Judgment Standard

Federal Rule of Civil Procedure 56 permits the entry of summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Fed. R. Civ. P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998). The court must "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990).

The parties do not truly dispute the material facts underlying Meshwerks's copyright claim. Rather, the parties dispute the manner in which

those facts are characterized. The only disagreement between the parties concerns whether the process of creating the digital models is dominated by creativity or technical know-how. But even the Toyota Defendants acknowledge that the modeling process is not entirely mechanical in nature. (*See* Reply Memo. in Supp. of Defs. Mot. for Part. Summ. J. 11 (dkt. #25) ("In a manner of speaking, it took 'creative judgments' to decide how best to depict the three-dimensional Vehicle in a two-dimensional display.").) The parties' disagreement concerning the accurate characterization of the modeling process does not preclude the entry of summary judgment on Meshwerks's copyright infringement claim. This is so because, even if Meshwerks's characterization of the modeling process is accepted as accurate, the digital models are nevertheless not copyrightable.[2] Accordingly this matter can be resolved on summary judgment. *See Magic Mktg., Inc. v. Mailing Servs. of Pittsburgh, Inc.*, 634

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[2] Meshwerks filed a motion to strike portions of the declaration of Brent Feeman, which was submitted by the Toyota Defendants in support of their motion for partial summary judgment. In an apparent attempt to address the concerns raised by Meshwerks, the Toyota Defendants responded by submitting a supplemental declaration of Mr. Feeman. But Meshwerks contends that the supplemental declaration suffers from deficiencies similar to those present in Mr. Feeman's first declaration. Nevertheless, because the court does not rely on the paragraphs of Mr. Feeman's declaration that Meshwerks seeks to strike and because the court adopts Meshwerks's recitation and characterization of the digital modeling process, the motion to strike Mr. Feeman's declaration is denied as moot.

F. Supp. 769 (W.D. Pa. 1986) ("The issue of copyrightability is typically resolved by a motion for summary judgment"); *cf. Sem-Torq, Inc. v. K Mart Corp.*, 936 F.2d 851, 853 (6th Cir. 1991) ("Copyrightability is often resolved on summary judgment.").

Analysis

I. Copyright Infringement

The Copyright Act provides that "[c]opyright protection subsists . . . in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced or otherwise communicated, either directly or with the aid of a machine or device." 17 U.S.C. § 102(a). "To qualify for copyright protection, a work must be original to the author." *Feist Pub., Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 345 (1991) (citing *Harper & Row, Pubs., Inc. v. Nat. Enterps.*, 471 U.S. 539, 547-49 (1985)). In fact, originality is "[t]he *sine qua non* of copyright." *Id.* The requirement of originality is met if the author created the work and the creation involved a creative component. *See id.* ("Original . . . means only that the work was independently created by the author . . . and . . . possesses at least some minimal degree of creativity."). With regard to the presence of creativity, the United States Supreme Court has stated: "To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of

works make the grade quite easily, as they possess some creative spark, no matter how crude, humble, or obvious it might be." *Id.* (internal quotation omitted).

The parties devote some time in their briefs to the presence of a presumption of copyright protection flowing from the registration certificates obtained by Meshwerks. *See Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 382 (D. Utah 1991) ("The registration certificate is *prima facie* evidence of copyright validity.") The effect of the presumption in this case is not in dispute. The Toyota Defendants have the burden of proving that the digital models created by Meshwerks are not copyrightable. *See id.* ("[T]he presumption is not absolute: 'possession of a registration certificate creates a rebuttable presumption that the work in question is copyrightable.'" (quoting *Whimsicality Inc. v. Rubie's Costume Co.*, 891 F.2d 452, 455 (2d Cir. 1989))). The Toyota Defendants attack the copyrightability of the Meshwerks models on creativity grounds, contending that the models fail to "make the grade," because they do not exhibit the "creative spark" that serves as the necessary predicate for copyright protection, *Feist*, 499 U.S. at 345.

In support of their position, the Toyota Defendants cite *ATC Distribution Group, Inc. v. Whatever It Takes Transmissions & Parts, Inc.*, 402 F.3d 700 (6th Cir. 2005), in which an auto parts dealer claimed that a competitor copied illustrations used in an auto parts catalog. *See id.* at 702-03, 712. The illustrations in *ATC Distribution Group* were "hand-drawn sketches of transmissions parts," that were originally

"copied from photographs cut out of competitors' catalogs." *Id.* In reaching the conclusion that the hand-drawn illustrations were not entitled to copyright protection, the Sixth Circuit focused on the lack of creative intent, stating that "[t]he illustrations were intended to be as accurate as possible in reproducing the parts shown in the photographs on which they were based, a form of slavish copying that is the antithesis of originality." *Id.* (citing *J. Thomas Distribs. v. Greenline Distribs.*, 100 F.3d 956 (6th Cir. 1996), *available at* No. 95-2100, 1996 WL 636138 at *1 (6th Cir. Oct. 31, 1996) (unpublished opinion) ("Plaintiff's spindle bearing was drawn with the express intention of duplicating on paper the appearance of an actual spindle bearing. Its reproduction involved absolutely no creative spark whatsoever.")).

Meshwerks contends that its modeling process involved much more that mere "slavish copying," *id.* Instead, Meshwerk analogizes its process to that undertaken by commercial photographers. In particular, Meshwerks relies on *SHL Imaging, Inc. v. Artisan House, Inc.*, 117 F. Supp. 2d 301 (S.D.N.Y. 2000), in which the court held that product photographs of mirrored picture frames were entitled to copyright protection, *id.* at 311.

The court in *SHL Imaging, Inc.* began its analysis with the acknowledgment that "[t]here is no uniform test to determine the copyrightability of photographs." *Id.* at 309-10. Citing the "almost limitless creative potential" offered by the medium of photography, the court commented that "[t]he

elements that combine to satisfy *Feist*'s minimal 'spark of creativity' standard will necessarily vary depending on the photographer's creative choices." *SHL Imaging, Inc.*, 117 F. Supp. 2d at 310. The court went on to state that "[t]he cumulative impact of these technical and artistic choices becomes manifest in renowned portraits, such as 'Oscar Wilde 18.' The measure or originality becomes more difficult to gauge as one moves from sublime expression to simple reproduction." *Id.*

The *SHL Imaging, Inc.* court viewed the product photographs that were the subject of the parties' dispute as less than sublime expression, but much more than simple reproduction. *See id.* at 311 ("While Lindner's works may not be as creative as a portrait by Dianne Arbus, they show artistic judgment and therefore meet the *Feist* standard."). In reaching its conclusion that the product photographs were protected by copyright, the court focused on the artistic choices made by the photographer. *See id.* at 311 ("What makes plaintiff's photographs original is the totality of the precise lighting selection, angle of the camera, lens and filter selection."). Nevertheless, the court noted that the copyright protection afforded to the photographs was narrow, stating that "[p]laintiff cannot prevent others from photographing the same frames, or using the same lighting techniques and blue sky reflection in the mirrors[;] . . . [p]ractically, the plaintiff's works are only protected from verbatim copying." *Id.*

The models created by Meshwerks are more analogous to the illustrations in *ATD Distribution Group* than to the photographs in *SHL Imaging, Inc.* The critical distinction between the present case and *SHL Imaging, Inc.* is the lack of a creative recasting of the Toyota vehicles. The photographer in *SHL Imaging, Inc.* used his camera to introduce new creative elements that elevated his photographs beyond mere replication. The illustrators in *ATC Distribution Group*, on the other hand, utilized their skill to reproduce, as accurately as possible, the auto parts they were attempting to depict. Similarly, in this case, Meshwerks's intent was to replicate, as exactly as possible, the image of certain Toyota vehicles. Although the tools used by the illustrators in *ATC Distribution Group* vary from the digital-modeling tools used by Meshwerks, the endeavor was identical: product-accurate representation without the introduction of new creative elements.

Todd v. Montana Silversmiths, Inc., 379 F. Supp. 2d 1110 (D. Colo. 2005), provides a helpful example of the distinction drawn in copyright law between skilled craft and creative, protectable, works. In *Todd*, a jewelry maker claimed that a competitor had impermissibly copied jewelry that the plaintiff had designed to resemble barbed wire. *Id.* at 1111. The court concluded that the plaintiff's design was not protected by copyright law. *See id.* at 1113-14. According to the *Todd* court, "[w]hile Plaintiff is no doubt a skilled artist capable of making jewelry with a certain aesthetic appeal, she has failed to show

what copyrightable features she has added to her work to separate it from ordinary public domain barbed-wire." *Id.* at 1113. The court, while acknowledging the skill and judgment involved in the design process, nevertheless declined to extend copyright protection to the unoriginal result of that process, stating that "[t]he fact remains that for all her aesthetic choices, the final arrangement of the elements in her jewelry still corresponds to the arrangement of public domain barbed-wire." *Id.*

Like the jeweler in *Todd*, Meshwerks no doubt made many judgments that required both skill and technical know-how. Those judgments may have even involved "creativity," as that word is commonly used. But the digital models created by Meshwerks are not original. Just as the jewelry in *Todd* ultimately corresponded to common barbed-wire, the digital models created by Meshwerks correspond to the Toyota vehicles they were intended to represent. Accordingly, Meshwerks's models are not protected by copyright law and the Toyota Defendants are entitled to summary judgment on Meshwerks's copyright claims.

II. State Law Claims

28 U.S.C. § 1367(c) allows federal district courts to decline exercising jurisdiction over state law claims when "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). In this case, the only cause of action

alleged by Meshwerks that is not dependent on federal copyright law is a breach of contract claim against Grace & Wild. Meshwerks's complaint does not allege that this court has original jurisdiction over that contract claim. Given the court's ruling on Meshwerks's copyright claims, the court declines to exercise supplemental jurisdiction over Meshwerks's contract claim. Accordingly, Meshwerks's contract claim is dismissed.

Conclusion

Although a great deal of skill and effort was involved in the creation of Meshwerks's three-dimensional digital models, those models do not meet the originality requirement established by copyright law. Accordingly, the models are not entitled to copyright protection. As a result, the Toyota Defendants are entitled to summary judgment on Meshwerks's copyright claims. Further, the court declines to exercise supplemental jurisdiction over Meshwerks's breach of contract claim and that claim is therefore dismissed.

For the foregoing reasons, the Toyota Defendants' Motion for Partial Summary Judgment and Dismissal of Remaining Claim (dkt. #11) is GRANTED and Plaintiff's Motion to Strike Feeman Declaration (dkt. #17) is DENIED as moot.

DATED this 12th day of September, 2006.

BY THE COURT:

/s/ Tena Campbell
TENA CAMPBELL
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

MESHWERKS, INC., a Utah corporation, Plaintiff-Appellant, v. TOYOTA MOTOR SALES U.S.A., INC., a California corporation; GRACE & WILD, a Michigan corporation doing business as Division X; 3D RECON, a Utah limited liability company; SAATCHI & SAATCHI NORTH AMERICA, a California corporation, Defendants-Appellees.	No. 06-4222

ORDER
(Filed August 14, 2008)

Before **BRISCOE**, **GORSUCH**, and **HOLMES**, Circuit Judges.

Appellant's petition for rehearing is denied. *See Utahns for Better Transp. V. U.S. Dep't of Transp.*, 319 F.3d 1207, 1210 (10th Cir. 2003) ("[W]e do not address issues or arguments raised on rehearing that a party

should have addressed in prior briefing. That is particularly true where those issues or arguments on rehearing take a much different tack than what was presented in the [prior] brief[s]." (internal citations omitted)).

Entered for the Court,

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

LEXSEE 57 FR 6201

LIBRARY OF CONGRESS

Copyright Office

AGENCY: Library of Congress, Copyright Office.

37 CFR Part 202

Registrability of Computer Programs That Generate Typefaces

[Docket No. RM 91-6]

57 FR 6201

February 21, 1992

ACTION: Final regulation.

SUMMARY: The purpose of this Final Regulation is to clarify the Copyright Office's practices regarding registration of claims to copyright in computer programs used in the generation of digitized representations of typeface designs. This r*egulation amends 37 CFR 202.1* to state the Office's existing practice in this respect. Pursuant to Congress's judgment in the 1976 Act[1] and case law,[2] the Copyright Office does not register claims to copyright in typeface designs as such, whether generated by a computer program, or

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[1] See H.R. REP. NO. 94-1476, 94th Cong., 2d Sess. 55 (1976): "Congress has considered, but chosen to defer, the possibility of protecting the design of typefaces." Thus, Congress could protect typeface designs under the Copyright Act if it chose.

[2] See *Eltra Corp. v. Ringer, 579 F. 2d 294 (4th Cir. 1978).*

represented in drawings, hard metal type, or any other form.

The Office does, however, register claims in original computer programs whether or not the end result or intended use of the computer program involves uncopyrightable elements or products. In the past, the Office has required a disclaimer for computer programs containing data depicting digitized representations of typeface designs. Due to changes in the industry and the administrative burden caused by correspondence, the Office will no longer require such disclaimers. Instead, in order to avoid any confusion about the scope of certificates of registration for computer programs used in the generation of digitized representations of typeface, the Office will not accept a nature of authorship statement of "entire work," "entire computer program," "entire text," or the like. Only descriptions such as "computer program" should be used. The scope of the copyright will be, as in the past, a matter for the courts to determine.

EFFECTIVE DATE: February 21, 1992.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, General Counsel, Copyright Office, Library of Congress, Washington, DC 20540. Telephone (202) 707-8380.

TEXT: SUPPLEMENTARY INFORMATION: On September 29, 1988, the Copyright Office published a Notice of Policy Decision regarding registration practices for computer programs used in conjunction

with digitized typeface, typefont, and letterforms. *53 FR 38110.* That decision was the result of a Notice of Inquiry published on October 10, 1986. *51 FR 36410.* The Policy Decision, based on the 1986 Notice of Inquiry, reiterated a number of previous registration decisions made by the Office. First, under existing law, typeface as such is not registrable. The Policy Decision then went on to state the Office's position that "data that merely represents an electronic depiction of a particular typeface or individual letterform" is also not registrable. Second, original computer programs are registrable, regardless of whether or not the functional result achieved is the generation of unregistrable typeface, typefonts, or letterforms. The Policy Decision concluded that, where a "master computer program includes data that fixes or depicts a particular typeface, typefont, or letterform, the registration application must disclaim copyright in that uncopyrightable data."

The Copyright Office has received a number of applications stating claims for computer programs used in conjunction with the generation or design of typeface, typefonts, or letterforms. In 1991, the Office became concerned that these claims indicated there had been a significant technological advance since the 1986 Notice of Inquiry. Of particular interest was the fact that some companies now license typeface in digitized form before they write a computer program permitting users to generate the typeface on low resolution and other printers.

In order to gain information, the Copyright Office held a Public Hearing on October 4, 1991 and received 21 written submissions. The majority of those testifying and submitting comments favored abandoning the disclaimer requirement. After a careful review of the testimony and the written comments, the Copyright Office is persuaded that creating scalable typefonts using already-digitized typeface represents a significant change in the industry since our previous Policy Decision. We are also persuaded that computer programs designed for generating typeface in conjunction with low resolution and other printing devices may involve original computer instructions entitled to protection under the Copyright Act. For example, the creation of scalable font output programs to produce harmonious fonts consisting of hundreds of characters typically involves many decisions in drafting the instructions that drive the printer. The expression of these decisions is neither limited by the unprotectible shape of the letters nor functionally mandated. This expression, assuming it meets the usual standard of authorship, is thus registrable as a computer program.

The Office has also gained considerable administrative experience in the last three years with the use of disclaimers. A large amount of correspondence has been necessitated by the requirement of disclaimers. The public has also been confused about the effect, if any, of variants in the language of particular disclaimers. We are persuaded that the usefulness of disclaimers is outweighed by these drawbacks, and,

thus, we will no longer require a disclaimer where the applicant does not state a claim in uncopyrightable material.

Final Regulation

In light of the heavy administrative burden imposed by disclaimers, the Copyright Office has concluded that the best course is to amend its regulations to state its opinion that digitized typeface as typeface is unregistrable, and to delete the disclaimer requirement. The term "typeface" is intended to encompass typefonts, letterforms, and the like. As part of the deletion of the disclaimer requirement, in order to avoid public confusion regarding the scope of certificates of registration issued for computer programs containing original instructions as well as digitized representations of typeface, applicants should not describe the nature of authorship as "entire work," "entire computer program," "entire text" or the like. Instead, descriptions such as "computer program" should be used. This preference regarding the nature of authorship statement will be included in Compendium II of Copyright Office Practices, but not in the Code of Federal Regulations. Because this regulation does not represent a substantive change in the rights of copyright claimants, claimants possessing already-issued certificates cannot submit a supplementary application for an already registered work for the purpose of removing the disclaimer.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress and is a part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, chapter 5 of the U.S. Code, subchapter II and chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined and hereby certifies that this regulation will have no significant negative impact on small businesses.

List of Subjects in 37 CFR Part 202

Registration of claims to copyright, Claims to copyright, Copyright registration.

Final Regulations

In consideration of the foregoing, the Copyright Office is amending part 202 of 37 CFR, chapter II in the manner set forth below.

PART 202 – REGISTRATION OF CLAIMS – [AMENDED]

1. The authority citation for part 202 continues to read as follows:

Authority: Section 702, 90 Stat. 2541; *17 U.S.C. 702.*

§ 202.1 [Amended]

2. Section 202.1(e) is added to read as follows:

* * * * *

(e) Typeface as typeface.

Dated: February 4, 1992.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

The Librarian of Congress.

[FR Doc. 92-4008 Filed 2-20-92; 8:45 am]

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Attorneys for Plaintiff/Counterclaim Defendant Meshwerks, Inc.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

MESHWERKS, INC., a Utah corporation, Plaintiff, vs. TOYOTA MOTOR SALES U.S.A., INC., a California corporation, GRACE & WILD, INC., dba "DIVISION X", a Michigan corporation, 3D RECON, L.L.C., a Utah Limited Liability Company, SAATCHI & SAATCHI NORTH AMERICA, INC. a California corporation, and JOHN DOES 1-10, Defendants.	DECLARATION OF KEVIN SCHEIDLE Civil No. 2: 06-CV-97 TC Judge Tena Campbell (Filed Apr. 28, 2006)

I, Kevin Scheidle, hereby declare as follows

1. I make the following declaration based on my own personal knowledge, and would so testify if called upon to do so.

2. I attended the Art Center College of Design in Pasadena, California for three years, where I majored in automotive design. I also spent another year studying design at Brigham Young University in Provo, Utah. Through these studies, I learned the design and related computer skills which I now employ in my occupation as a graphic sculptor.

3. I am an employee and principal of plaintiff Meshwerks, Inc., which is in the business of creating three-dimensional (3-D) digital models ("Meshwerks").

4. As part of my job duties for Meshwerks, I create 360 degree 3-D digital models of real life object such as automobiles, and have worked in that capacity with different employers during the past fifteen (15) years.

5. Because of the creative work involved in making these 3-D digital models, my job titles with different employers have been that of "Digital Sculptor" and "Digital Designer".

6. A great deal of skill, effort and creativity is required to create realistic 3-D digital models. In effect, I am required to create the illusion of three-dimensionality on a two-dimensional computer screen.

7. I use various tools in creating these 3-D digital models, including measurements of the actual object, photographs of the object and its detail areas, engineering drawings, computer hardware, general modeling software programs such as Maya 5.0, and special digital modeling tools developed by Meshwerks.

8. However, these are simply tools which help me create the digital models, much as a painter or sculptor might use a reference photograph or measurements of the object being depicted, and a pencil or chisel to create the artist's depiction of that object.

9. As part of my work for Meshwerks, I was involved in creating the 360 degree 3-D digital models of the Toyota automobiles at issue in this case, including the Prius, Tundra, Solara, Sienna, Rav4, Hilander, Camry, and 4Runner models (collectively "the 3D Digital Models").

10. In fact, I negotiated the terms of Meshwerk's agreement with defendant Grace & Wild, Inc. dba "Division X" ("G&W"), and was the project manager in charge of creating the 3-D Digital Models.

11. In both negotiating and managing the Toyota modeling project, I principally dealt with G&W's employee Kevin Gillespie, who was supervising the project for G&W.

12. The first step we used in creating the 3-D Digital Models was to measure the Toyota vehicles themselves, by placing tape in a grid pattern over

different parts of the vehicles, and then capture the reference points with a portable coordinate measurement machine.

13. We then inputted these reference points into a computer software program which connected them with grid lines, thereby creating a rough representations of the measured parts.

14. Attached hereto as Exhibit "1" is a computer screen printout of this beginning stage of the Toyota Prius modeling project, showing a jumbled mess of grid lines and measured parts. The Prius screen prints attached to this Declaration are representative of the other Toyota vehicles for which Meshwerks created 3-D digital models.

15. Using these digital measurement points and contour lines, photographs, and other reference materials, we began the process of creating the actual 3-D digital models of the Toyota vehicles.

16. The first step in the modeling process was to unscrambled the various measured parts to create rough outlines of the Toyota vehicles, much like an artist's rough sketch. *See* second stage of Prius modeling project, at Exhibit "2".

17. As shown by those outlines, the digital measurement process does not capture certain areas, such as wheels, headlights, certain interior areas, or detail areas. *See* Ex. 2

18. Moreover, only one half of the car is measured in this way, as the other half is later created

during the modeling process so that the finished 3-D model is symmetrical. *See* Ex. 2.

19. The modeling process is very time consuming, and took approximately 80 to 100 man hours per Toyota vehicle.

20. Part of the art involved in making usable 3-D digital models is to create the illusion of detail using the least amount of lines and data.

21. In modeling the Toyota vehicles, it was necessary to modify nearly every line created by the digital measurement points, and to also add numerous points and lines from scratch.

22. This was done both to create detail areas which were not measured, but also to modify the digital measurements that were captured to create the visual appearance of three-dimensionality on a computer screen.

23. In fact, the modeling process is similar to making a detailed dimensional drawing of the car's exterior and interior components and details. *See* screen prints showing the final version of the Toyota Prius 3-D Digital Model, at Exhibit "3".

24. Some of the detail areas that had to be created from scratch on the Toyota vehicles were the wheels, headlights, handles, wipers and emblems.

25. Because those areas could not be measured, we used photographs of them as reference materials to create our computer renderings. *See* computer

screen print of finished wheel, handle and taillight areas (compare with rough outline from digital measurements and photograph), at Ex. "4"; finished headlight (with rough outline and photograph), at Ex. "5", and finished emblem (with rough outline and photograph), at Ex. "6".

26. The completed 3-D Digital Models are not replicas of the Toyota vehicles, nor even precise representations of them. In fact, almost none of the points on the finished 3-D Digital Models correspond to the actual specifications of the corresponding vehicles.

27. That is also why 3-D digital models created by different digital sculptors will have different contour lines and details, even though they may be based on the same object.

28. Typically, ninety percent (90%) of the points and lines in a completed 3-D digital model are different from the original points recorded in the digital measurement stage.

29. This was also the case with the 3-D Digital Models created by Meshwerks of the Toyota vehicles.

30. These 3-D Digital Models were designed to be viewed as part of a software program running on a computer screen, since they allow the use to view different angles, move the vehicles in various ways, and explore interior areas.

31. As a result, the complete 3-D Digital Models cannot be printed out on paper except as the

computer code reflecting 1) the Maya file format, 2) computer code evidencing the use of Meshwerks' special modeling tools, and 3) the embedded digital information reflecting the models themselves.

32. The printouts of the digital files in "ASCII" format submitted with Meshwerks' copyright registrations for the 3-D Digital Models contain each of these types of information.

33. In fact, it because of those unique indicators that I can tell that the Toyota defendants have copied, displayed and/or used Meshwerks' 3-D Digital Models for purposes other than the limited use originally authorized by Meshwerks.

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 26 day of April, 2006.

/s/ Kevin Scheidle
Kevin Scheidle

Copyright Office fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.

Form TX

For a Nondramatic Literary Work
UNITED STATES COPYRIGHT OFFICE

REGISTRATION NUMBER

TX TXU

EFFECTIVE DATE OF REGISTRATION

Month Day Year

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

1 TITLE OF THIS WORK ▼
3-Dimensional Models of 2004 Toyota Camry

PREVIOUS OR ALTERNATIVE TITLES ▼

PUBLICATION AS A CONTRIBUTION If this work was published as a contribution to a periodical, serial, or collection, give information about the collective work in which the contribution appeared. Title of Collective Work ▼

If published in a periodical or serial give: Volume ▼ Number ▼ Issue Date ▼ On Pages ▼

2 a NAME OF AUTHOR ▼
Meshwerks, Inc.

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☑ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ _____
Domiciled in ▶ U.S.A.

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☑ No
Pseudonymous? ☐ Yes ☑ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼
Computer program, of which the first and last 10 pages are provided.

NOTE
Under the law, the "author" of a "work made for hire" is generally the employer, not the employee (see instructions). For any part of this work that was "made for hire" check "Yes" in the space provided, give the employer (or other person for whom the work was prepared) as "Author" of that part, and leave the space for dates of birth and death blank.

b NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ _____
Domiciled in ▶ _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

c NAME OF AUTHOR ▼

DATES OF BIRTH AND DEATH
Year Born ▼ Year Died ▼

Was this contribution to the work a "work made for hire"?
☐ Yes
☐ No

AUTHOR'S NATIONALITY OR DOMICILE
Name of Country
OR { Citizen of ▶ _____
Domiciled in ▶ _____

WAS THIS AUTHOR'S CONTRIBUTION TO THE WORK
Anonymous? ☐ Yes ☐ No
Pseudonymous? ☐ Yes ☐ No
If the answer to either of these questions is "Yes," see detailed instructions.

NATURE OF AUTHORSHIP Briefly describe nature of material created by this author in which copyright is claimed. ▼

3 a YEAR IN WHICH CREATION OF THIS WORK WAS COMPLETED This information must be given in all cases.
2003 ◀ Year

b DATE AND NATION OF FIRST PUBLICATION OF THIS PARTICULAR WORK
Complete this information ONLY if this work has been published.
Month ▶ _____ Day ▶ _____ Year ▶ _____ ◀ Nation

4 COPYRIGHT CLAIMANT(S) Name and address must be given even if the claimant is the same as the author given in space 2. ▼
Meshwerks, Inc.
10801 South Country Creek Drive
South Jordan, Utah 84095

See instructions before completing this space

TRANSFER If the claimant(s) named here in space 4 is (are) different from the author(s) named in space 2, give a brief statement of how the claimant(s) obtained ownership of the copyright. ▼

DO NOT WRITE HERE OFFICE USE ONLY

APPLICATION RECEIVED

ONE DEPOSIT RECEIVED

TWO DEPOSITS RECEIVED

FUNDS RECEIVED

MORE ON BACK ▶ • Complete all applicable spaces (numbers 5-9) on the reverse side of this page. • See detailed instructions. • Sign the form at line 8.

DO NOT WRITE HERE
Page 1 of _____ pages

App. 62

EXAMINED BY FORM TX

CHECKED BY

CORRESPONDENCE Yes

FOR COPYRIGHT OFFICE USE ONLY

DO NOT WRITE ABOVE THIS LINE. IF YOU NEED MORE SPACE, USE A SEPARATE CONTINUATION SHEET.

PREVIOUS REGISTRATION Has registration for this work, or for an earlier version of this work, already been made in the Copyright Office?

☐ Yes ☑ No If your answer is "Yes," why is another registration being sought? (Check appropriate box.) ▼

a. ☐ This is the first published edition of a work previously registered in unpublished form.

b. ☐ This is the first application submitted by this author as copyright claimant.

c. ☐ This is a changed version of the work, as shown by space 6 on this application.

If your answer is "Yes," give: Previous Registration Number ▶ Year of Registration ▶

5

DERIVATIVE WORK OR COMPILATION

Preexisting Material Identify any preexisting work or works that this work is based on or incorporates. ▼

a **6**

See instructions before completing this space.

Material Added to This Work Give a brief, general statement of the material that has been added to this work and in which copyright is claimed. ▼

b

DEPOSIT ACCOUNT If the registration fee is to be charged to a Deposit Account established in the Copyright Office, give name and number of Account.

Name ▼ Account Number ▼

a **7**

CORRESPONDENCE Give name and address to which correspondence about this application should be sent. Name/Address/Apt/City/State/ZIP ▼

b

Brent T. Winder c/o Jones Waldo Holbrook McDonough PC
170 South Main Street, Suite 1500
Salt Lake City, Utah 84101

Area code and daytime telephone number ▶ 801-521-3200 Fax number ▶ 801-328-0537

Email ▶ bwinder@joneswaldo.com

CERTIFICATION* I, the undersigned, hereby certify that I am the

Check only one ▶
- ☐ author
- ☐ other copyright claimant
- ☐ owner of exclusive right(s)
- ☑ authorized agent of Meshworks, Inc.

Name of author or other copyright claimant, or owner of exclusive right(s) ▲

of the work identified in this application and that the statements made by me in this application are correct to the best of my knowledge.

8

Typed or printed name and date ▼ If this application gives a date of publication in space 3, do not sign and submit it before that date.

Brent T. Winder, Attorney for Registrant Date ▶ 2/25/05

Handwritten signature (X) ▼

X

Certificate will be mailed in window envelope to this address:

Name ▼
Brent T. Winder c/o Jones Waldo Holbrook & McDonough

Number/Street/Apt ▼
170 South Main Street, Suite 1500

City/State/ZIP ▼
Salt Lake City, Utah 84101

YOU MUST:
- Complete all necessary spaces
- Sign your application in space 8

SEND ALL ELEMENTS IN THE SAME PACKAGE:
1. Application form
2. Nonrefundable filing fee in check or money order payable to Register of Copyrights
3. Deposit material

MAIL TO:
Library of Congress
Copyright Office - TX
101 Independence Avenue, S.E.
Washington, D.C. 20559-6222

9

Fees are subject to change. For current fees, check the Copyright Office website at www.copyright.gov, write the Copyright Office, or call (202) 707-3000.

*17 U.S.C. § 506(e): Any person who knowingly makes a false representation of a material fact in the application for copyright registration provided for by section 408, or in any written statement filed in connection with the application, shall be fined not more than $2,500.

Rev: July 2003—xxx Web Rev: July 2003 ♻ Printed on recycled paper

U.S. Government Printing Office: 2006-461-113/20,021

App. 63

```
//Maya ASCII 5.0 scene
//Name: Camry.ma
//Last modified: Thu, Mar 17, 2005 10:34:34 AM
requires maya "5.0";
currentUnit -l centimeter -a degree -t film;
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fileInfo "product" "Maya Unlimited 5.0";
fileInfo "version" "5.0";
fileInfo "cutIdentifier" "200304010010";
fileInfo "osv" "Microsoft Windows XP Service Pack 1 (Build 2600)\n";
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      setAttr ".t" -type "double3" 415.1979386561654 243.63990277017282
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      setAttr ".r" -type "double3" -20.738352729602457
49.000000000000007 0 ;
createNode camera -s -n "perspShape" -p "persp";
      setAttr -k off ".v" no;
      setAttr ".fl" 34.999999999999993;
      setAttr ".fcp" 100000;
      setAttr ".coi" 518.62497523011405;
      setAttr ".imn" -type "string" "persp";
      setAttr ".den" -type "string" "persp_depth";
      setAttr ".man" -type "string" "persp_mask";
      setAttr ".hc" -type "string" "viewSet -p %camera";
createNode transform -s -n "top";
      setAttr ".v" no;
      setAttr ".t" -type "double3" 0 100 0 ;
      setAttr ".r" -type "double3" -89.999999999999986 0 0 ;
createNode camera -s -n "topShape" -p "top";
      setAttr -k off ".v" no;
      setAttr ".rnd" no;
      setAttr ".coi" 100;
      setAttr ".ow" 30;
      setAttr ".imn" -type "string" "top";
      setAttr ".den" -type "string" "top_depth";
      setAttr ".man" -type "string" "top_mask";
      setAttr ".hc" -type "string" "viewSet -t %camera";
      setAttr ".o" yes;
createNode transform -s -n "front";
      setAttr ".v" no;
      setAttr ".t" -type "double3" 0 0 100 ;
createNode camera -s -n "frontShape" -p "front";
      setAttr -k off ".v" no;
      setAttr ".rnd" no;
      setAttr ".coi" 100;
      setAttr ".ow" 30;
      setAttr ".imn" -type "string" "front";
      setAttr ".den" -type "string" "front_depth";
      setAttr ".man" -type "string" "front_mask";
      setAttr ".hc" -type "string" "viewSet -f %camera";
      setAttr ".o" yes;
createNode transform -s -n "side";
      setAttr ".v" no;
      setAttr ".t" -type "double3" 100 0 0 ;
      setAttr ".r" -type "double3" 0 89.999999999999986 0 ;
createNode camera -s -n "sideShape" -p "side";
```

App. 64